Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

JOSEPH R. GREGG, LUIS MENCHACA, FRANCIS S. PAGNANELLI, WILLIAM C. RAISER, MICHAEL A. HENRY, ROSE KIDD, ARNOLD MATHESON, KATHARINE O'KEEFE, EVA ALVARADO, JOSEPH F. O'HARA, JOSEPH H. ROACH, ROBERT RUDNICK, JAMES SODERNA, JAMES SWEATT, ELIZABETH WAGI, BYRON ADAMS, KEVIN BLAKE, AMY BOISSONNEAULT, STEPHEN C. ELLIOT, SHERYL FITZPATRICK, DENNIS GREEN, GEORGE LYNCH, RAYMOND MICCO, ALEXIS MULRENAN, RALPH TRAPHAGEN, JAMES TROTT, KIMIKO TROTT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Congress exceed its Commerce Clause power when it enacted the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248?

LIST OF PARTIES

Three parties from below are not part of the petition caption. Baldo Dino was a defendant in the district court and appellee below. He died during the course of the appellate process. We are also advised that Ruby McDaniel, who was a defendant in the district court and an appellee below, died a few weeks ago. Their estates have not been substituted, albeit a suggestion of death as to Ruby McDaniel has yet to be filed.

Mary Foley was a defendant but was dismissed in the district court.

None of the petitioners in this case are a corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	7
Reasons for Granting the Writ	11
The Court Of Appeals Did Not Follow *United States v. Morrison*	11
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Hill v. Colorado, 120 S. Ct. 2480 (2000) 17

Lawson v. Murray, 515 U.S. 1110 (1995) 18

Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000) 15

Roe v. Wade, 410 U.S. 113 (1973) 9

Stenberg v. Carhart, 120 S. Ct. 2597 (2000) 15

United States v. Bird, 124 F.3d 667 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998) 14

United States v. Hart, 212 F.3d 1067, 1074, *rehearing & rehearing en banc denied*, 2000 U.S. App. LEXIS 14151 (8th Cir. June 16, 2000), *petition for cert. filed*, No. 00-6137 (U.S. Sept. 12, 2000) 12

United States v. Lopez, 514 U.S. 549 (1995) ...9, 13, 14

United States v. Morrison, 529 U.S. 598 (2000) 9, 11, 12, 14, 15, 16

United States Constitution:

U.S. Const. art. 1, § 8, cl. 3 1

Cited Authorities

Page

Statutes:

18 U.S.C. § 248 ..... i, 1, 7, 11

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1345 ..... 1, 11

42 U.S.C. § 13981 9

N.J. Stat. Ann. § 2A:65A-5 *et seq.* 15

Violence Against Women Act of 1994, § 4032, 108 Stat. 1941-1942 9

Other Authority:

Ruth Padawer, "The facts on partial-birth abortion: Both sides have misled the public," *The Record*, Sept. 15, 1996 10

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Dated And Filed September 7, 2000 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The District Of New Jersey Entering Final Judgment Dated, Decided And Filed December 11, 1998 ..... 50a

Appendix C — Preliminary Injunction Of The United States District Court For The District Of New JerseyDated December 22, 1997 ..... 77a

OPINIONS BELOW

Both the opinion of the Court of Appeals and of the District Court are reported, *United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000), *aff'g*, 32 F. Supp. 2d 151 (D.N.J. 1998). Copies of these opinions are included in Appendices A and B. The district judge dealt with the Commerce Clause issue in his Findings of Fact and Conclusions of Law, Appendix C.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 248 and 28 U.S.C. § 1345. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The judgment of the Court of Appeals for the Third Circuit was entered on September 7, 2000, and this petition for certiorari was timely filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

"The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3.

Freedom of Access to Clinic Entrances Act (FACE)

(a) Prohibited activities. Whoever —

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate

or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. Whoever violates this section shall —

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies.

(1) Right of action.

(A) In general. Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States.

(A) In general. If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent —

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State attorneys general.

(A) In general. If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. Nothing in this section shall be construed —

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free

exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. As used in this section:

(1) Facility. The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides

reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 248.

STATEMENT OF THE CASE

This matter arose out of protests at a partial-birth abortion clinic in Englewood, New Jersey, which occurred on August 7, 1996, January 18, 1997 and March 15, 1997. The Attorney General of the United States sued 30 defendants who had participated in one or more of the three protests at Metropolitan Medical Associates. The Complaint, which was brought in the United States District Court for the District of New Jersey, sought a 60 foot bubble zone injunction around Metropolitan, and statutory damages pursuant to the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248.

After a hearing with witnesses, the district judge issued a very limited preliminary injunction. In his Preliminary Injunction, Findings of Fact, and Conclusions of Law and Order, Appendix C, the district judge denied a bubble zone injunction, and merely enjoined the defendants from blocking the doors or entering Metropolitan.

The United States refused to allow the preliminary injunction to be entered as a final injunction, and proceeded with extensive discovery, eventually moving for summary judgment seeking a bubble zone injunction and the assessment of $5,000 statutory damages against each defendant, multiplied by the number of protests in which each defendant had participated. In other words, if a defendant had participated in all three protests, the Attorney General sought $15,000 statutory damages from that defendant. If a defendant had participated in only one of the three protests, the Attorney General sought only $5,000 statutory damages from that individual. Thus, according to the Attorney General, approximately $175,000 in damages was sought.

On summary judgment, the district judge refused to expand the preliminary injunction, and he agreed with one of the defendants' alternate arguments to the extent that the statutory damages would be assessed as a total of $5,000 per event, and not per person, per event. In other words, the United States could recover only a total of $15,000 and not $175,000.

The Attorney General appealed the statutory damage issue to the United States Court of Appeals for the Third Circuit.

In response to the Attorney General's appeal, various of the defendants appealed with respect to certain statutory construction issues and constitutional issues, including whether Congress had exceeded its Commerce Clause power in enacting FACE.

Three weeks following oral argument of the *Gregg* case in the Court of Appeals, this Court decided *United States v. Morrison*, 529 U.S. 598 (2000), which held unconstitutional 42 U.S.C. § 13981, which was part of the Violence Against Women Act of 1994, § 4032, 108 Stat. 1941-1942. This Court held that the enactment of § 13981 was beyond the Commerce Clause power of Congress.

On September 7, 2000, the Court of Appeals for the Third Circuit filed its decision in this case, which affirmed the judgment of the District Court. As to the claim that Congress had exceeded its Commerce Clause power in enacting FACE, the Court of Appeals split 2-1, with Judge Weis dissenting, wherein he maintained that together, *United States v. Lopez*, 514 U.S. 549 (1995) and *Morrison* compelled a holding that Congress had exceeded its power in enacting FACE. *Gregg*, 226 F.3d at 268, App. 33a.

Shortly after this Court decided *Roe v. Wade*, 410 U.S. 113 (1973), the Superior Court of New Jersey, Chancery Division, Bergen County entered an injunction limiting pro-life protesters to an area across the street from Metropolitan Medical Associates, an abortion facility then operating under a doctor's general license. The injunction limited protest activities to two hours a week. Ironically, the area across the street from Metropolitan is the public library of Englewood, New Jersey.

The years went by without much conflict. However, on August 7, 1996, five of the defendants entered the premises of Metropolitan and, using cable bicycle locks, locked themselves together and prayed. They were removed from the premises by the police, arrested and charged with various violations of the state criminal law. Although the record below does not document whether or not these five protestors were aware that Metropolitan was performing partial birth abortions, before the later larger protests occurred, a leading newspaper in Northern New Jersey carried a lead article that Metropolitan Medical Associates was performing 1,500 partial birth abortions a year. Ruth Padawer, "The facts on partial birth abortion: Both sides have misled the public," *The Record*, Sept. 15, 1996, at A1.

On January 18 and March 15, 1997, additional protests occurred. However, in these protests, the defendants merely sat down in front of the entrance door and had to be removed by the police. They were likewise arrested and charged with various violations of the state criminal law.

After the first protest occurred in August of 1996, United States Senator (then Congressman) Torricelli, who resides in Englewood, requested that Attorney General Janet Reno take action, which she did.

At the January and March 1997 protests, F.B.I. agents and U.S. Marshals were present. After another protest in April 1997, during which the police controlled the crowd and no blockage of the doors took place, the State of New Jersey teamed up in a two-prong offensive with the Justice Department.

On the State side, the August 1996 defendants were indicted by a grand jury for violating the 1973 state court injunction, with indictments as to the other protesters to follow.

Almost simultaneously, the Civil Rights Division of the Justice Department from Washington filed suit against the 30 protesters, claiming violation of FACE and seeking a bubble zone injunction and damages specifically limited to statutory damages.

The indictments in the state court were dismissed because there had been a change of ownership in Metropolitan from a physician operating as a professional corporation, in which only physicians could participate, to an ordinary corporation, with an interest held by a non-physician. The state court held that the state injunction did not survive the transfer.

Jurisdiction in the District Court was found under the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 and under 28 U.S.C. § 1345.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DID NOT FOLLOW *UNITED STATES v. MORRISON*

FACE simply does not square with this Court's recent holding in *United States v. Morrison*, 529 U.S. 598 (2000).

The majority in the Court of Appeals attempted to circumvent this Court's holding in *Morrison*. However, in dissent, Judge Weis hit the nail on the head when he wrote:

> FACE is a glaring example of the federalization of local criminal law that is fatally flawed in its implementation because it regulates activities with no commercial character. The statute contains no jurisdictional element which might cabin its operation within the confines of the

> Commerce Clause, and the congressional findings fail to provide the necessary justification for federal intrusion into local law enforcement.

United States v. Gregg, 226 F.3d at 274, App. 46a.

Although the Second, Fourth, Fifth, Seventh, Eighth,[1] Eleventh, and D.C. Circuit Courts of Appeals have rejected Commerce Clause attacks on the constitutionality of FACE, they did so prior to the decision in *Morrison*. The ink was hardly dry on this Court's decision in *Morrison* when the majority of the Third Circuit determined to reject *Morrison* by a painful attempt to distinguish it. Before beginning to distinguish *Morrison*, the Court of Appeals' majority wrote:

> Whether FACE is a proper exercise of Congress's commerce power has been much discussed in published opinions of United States Courts of Appeals. Indeed, this is one of the last federal appellate tribunals to address the issue. After considering most, if not all, of the arguments presented by the defendants in this case, these courts held that FACE is valid under the Commerce Clause. See *United States v. Hart*, 212 F.3d 1067, 1074[, *rehearing & rehearing en banc denied*, 2000 U.S. App. LEXIS 14151

1. *United States v. Hart*, 212 F.3d 1067, 1074, *rehearing & rehearing en banc denied*, 2000 U.S. App. LEXIS 14151 (8th Cir. June 16, 2000), *petition for cert. filed*, No. 00-6137 (U.S. Sept. 12, 2000) is technically a post-*Morrison* decision because *Morrison* was decided after the Eighth Circuit's decision but before the rehearing denial. However, we are informed that the *Morrison* issue was not raised in the rehearing request and that the main issue in that case concerns symbolic speech and not Commerce Clause issues.

> (8th Cir. June 16, 2000), *petition for cert. filed*, No. 00-6137 (U.S. Sept. 12, 2000)]; *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999); *Hoffman v. Hunt*, 126 F.3d 575, 582-88 (4th Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *United States v. Bird*, 124 F.3d 667, 672-82 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998); *Terry v. Reno*, 101 F.3d 1412, 1415-18 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997); *United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir.), *cert denied*, 519 U.S. 1006 (1996); *United States v. Dinwiddie*, 76 F.3d 913, 919-21 (8th Cir.), *cert. denied*, 519 U.S. 1043 (1996); *United States v. Wilson*, 73 F.3d 675, 679-88 (7th Cir. 1995), *cert. denied*, 519 U.S. 806 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1519-22 (11th Cir. 1995). Today, this Circuit aligns with the decisions of its sister courts of appeals and holds that FACE is a proper exercise of Congress's Commerce Clause power.

United States v. Gregg, 226 F.3d at 261, App. 16a.

Both the majority and dissenting opinions in the Court of Appeals centered on the third criterion of *United States v. Lopez*, 514 U.S. 549 (1995), concerning regulation of "those activities having a substantial relation to interstate commence . . . *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559.

Both the majority and the dissent below agreed that the first *Lopez* criterion was not applicable, *i.e.*, regulation of the channels of interstate commerce.

As respects the second *Lopez* criterion, regulation of the instrumentalities of interstate commerce, the majority below did not reach that issue, *Gregg*, 226 F.3d at 262, App. 18a, and the dissent rejected that argument as advanced by the Attorney General, 226 F.3d at 274, App. 46a.

On the issue of the commercial aspect of the activity, the majority departs from this Court's *Morrison* decision by distinguishing gender-motivated crimes as not in any sense an economic activity. The majority points to the *unintended effect* of the pro-life activity regulated by FACE as impacting on the commercial pursuits of the abortion provider as meeting the economic prong of *Lopez*. The dissent of Judge Weis rightly maintained that

> [t]he fact that criminal conduct may also have financial effects does not transform that activity into one commercial in nature. Murder and robbery have monetary consequences, but that does not transform criminal codes into commercial regulation. *Morrison* made it clear that the nature of the activity to be restricted is determined by an examination of the conduct itself, and not by such external factors as financial effects, which are one step removed from the statute's focus . . .

Gregg, 226 F.3d at 270, App. 37a.

With respect to the absence of a jurisdictional element in the statute, the majority used circular reasoning to overcome this fatal defect in FACE. The majority, relying on *Bird*, 124 F.3d at 676, opined:

> [a]lthough such an element would certainly lend support to the conclusion that FACE is tied to

> interstate commerce, we conclude that it was not necessary for Congress explicitly to limit the civil remedy provision in the case of regulating anti-abortion activity directed at reproductive health clinics that are, by definition, directly engaged in the business of providing reproductive health services.

Gregg, 226 F.3d at 263, App. 20a.

Judge Weis, in his dissent below, aptly pointed to the absence of a jurisdictional element as not being cured by the congressional findings, and maintained that because of the lack of a jurisdictional hook, the delicate federal-state balance is significantly changed and that Congress was merely extending a "remedy over a wider, and more purely intrastate body of violent crime." 226 F.3d at 271, App. 40a, citing *Morrison*, 529 U.S. at 672.

Here, non-violent citizens rose up to protest a partial-birth abortion facility. Clearly, Congress never intended to protect such places. In fact, Congress adopted a ban on partial-birth abortion in 1995, but it was vetoed by the President. Moreover, while the instant case was pending in the District Court, the New Jersey Legislature banned partial-birth abortion. N.J. Stat. Ann. § 2A:65A-5 *et seq.*[2]

Partial-birth abortion is a controversial issue in this country, with most citizens being horrified by it. Certainly, Congress never intended to make a federal offense out of the conduct of citizens protesting such a practice, especially

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2. The New Jersey statute was later declared unconstitutional in *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000), which followed *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

in a state which attempted to outlaw the practice. The lack of jurisdictional element is therefore fatal to the statute.

As respects legislative findings, the majority below went in blind lockstep with the congressional findings and failed to follow this Court's admonition that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 674.

Moreover, as Judge Weis maintained in his dissent, the legislative history of FACE is no more than a

> ". . . but-for causal chain" of logic that the Court explicitly rejected in *Morrison*. [529 U.S. at 674]. If every attenuated effect upon interstate commerce stemming from an occurrence of violent crime satisfied the substantial effects test, then Congress could "regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."

Gregg, 226 F.3d at 272, App. 42a .

Finally, although the majority below found a rational basis in the congressional findings to conclude a substantial effect on interstate commerce, the dissenting judge did not.

Here, five of the defendants actually entered the building and chained themselves together inside the facility. Certainly the State of New Jersey had adequate means to deal with those defendants under its criminal laws and New Jersey could have passed a statute similar to the one upheld in

Hill v. Colorado, 120 S. Ct. 2480 (2000). As it was, New Jersey actually indicted the five for violation of the 1973 state court injunction. It was only the mistake of the clinic owners in attempting to buy the state court injunction from the prior owner of the facility that saved these protesters and those outside the doors from conviction of a crime and a jail term.

Further, all of the defendants were arrested and charged with violating the state court injunction, resisting arrest and other violations. Their indictment for violating the state court injunction would have followed but for the dismissal of the indictment of the first five demonstrators.

Moreover, once the local authorities came to terms with the fact that the citizens were up in arms about the existence of a partial-birth abortion clinic in their midst, they were able to adequately protect the facility such that at a fourth demonstration in April 1997, the police controlled the demonstrators and no blockage occurred.

In his dissent, Judge Weis found it "difficult to understand why the federal government invoked FACE when local authorities had the situation well in hand." 226 F.3d at 273, App. 45a. There was clearly an overlapping of federal and state authority. As Judge Weis put it, using the words of Justice Kennedy:

> "[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. 'Federalism serves to assign political responsibility, not to obscure it.' " *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring) (quoting

> *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). When overlapping occurs, the lines drawn by federalism are blurred and the "resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power."

Gregg, 226 F.3d at 273, App. 46a.

FACE represents an overreaching by Congress, enacted in a time of pro-abortion hysteria when even peaceful protests were viewed as posing an intolerable threat to public order. *See Lawson v. Murray*, 515 U.S. 1110 (1995) (Scalia, J., concurring). We can now look back and see the statute's lack of relevant connection to the Commerce Clause authority of Congress and it should be found unconstitutional.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED SEPTEMBER 7, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 99-5079, 99-5124, 99-5205

UNITED STATES OF AMERICA,

Appellant in No. 99-5079

v.

JOSEPH R. GREGG; RUBY C. MCDANIEL; LUIS MENCHACA; FRANCIS S. PAGNANELLI; WILLIAM CHARLES RAISER; MICHAEL HENRY; ROSE KIDD; ARNOLD MATHESON; KATHARINE O'KEEFE; EVA ALVARADO; JOSEPH F. O'HARA; JOSEPH ROACH; ROBERT RUDNICK; JAMES SODERNA; JAMES SWEATT; ELIZABETH WAGI; BYRON ADAMS; KEVIN BLAKE; AMY BOISSONNEAULT; BALDO DINO; STEPHEN C. ELLIOT; SHERYL FITZPATRICK; MARY FOLEY; DENNIS GREEN; GEORGE LYNCH; RAYMOND MICCO; ALEXIS MULRENAN; RALPH TRAPHAGEN; JAMES TROTT; KIMIKO TROTT

UNITED STATES OF AMERICA,

v.

JOSEPH R. GREGG; RUBY MCDANIEL; LUIS MENCHACA; FRANCIS S. PAGNANELLI; WILLIAM

Appendix A

RAISER; MICHAEL A. HENRY; ROSE KIDD; ARNOLD MATHESON; KATHARINE O'KEEFE; EVA ALVARADO; JOSEPH O'HARA; JOSEPH H. ROACH; ROBERT RUDNICK; JAMES SODERNA; JAMES SWEATT; ELIZABETH WAGI; BYRON ADAMS; KEVIN BLAKE; AMY BOISSONNEAULT; BALDO DINO; STEPHEN ELLIOT; SHERYL FITZPATRICK; MARY FOLEY; DENNIS GREEN; GEORGE LYNCH; RAYMOND MICCO; ALEXIS MULRENAN; RALPH TRAPHAGEN; JAMES TROTT; KIMIKO TROTT

Rose Kidd; James Sweatt; Elizabeth Wagi; Raymond Micco; William Raiser; James Soderna; Kevin Blake; Baldo Dino;

Appellants in No. 99-5124.

UNITED STATES OF AMERICA,

v.

JOSEPH R. GREGG; RUBY MCDANIEL; LUIS MENCHACA; FRANCIS PAGNANELLI; WILLIAM RAISER; MICHAEL A. HENRY; ROSE KIDD; ARNOLD MATHESON; KATHARINE O'KEEFE; EVA ALVARADO; JOSEPH O'HARA; JOSEPH H. ROACH; ROBERT RUDNICK; JAMES SODERNA; JAMES SWEATT; ELIZABETH WAGI; BYRON ADAMS; KEVIN BLAKE; AMY BOISSONNEAULT; BALDO DINO; STEPHEN ELLIOT; SHERYL FITZPATRICK; MARY FOLEY; DENNIS GREEN; GEORGE LYNCH; RAYMOND MICCO; ALEXIS MULRENAN; RALPH TRAPHAGEN; JAMES TROTT; KIMIKO TROTT

Appendix A

Francis S. Pagnanelli,

Appellant in No. 99-5205

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 97-cv-02020)
District Judge: Honorable John C. Lifland

Argued: April 25, 2000

Before: BECKER, *Chief Judge*, WEIS and
OAKES,* *Circuit Judges*.

(Filed: September 7, 2000)

* * *

OPINION OF THE COURT

OAKES, *Circuit Judge*.

In this case, the United States appeals the decision of the District Court for the District of New Jersey (John C. Lifland, *Judge*) that the defendants are jointly and severally liable, rather than individually liable, for statutory damages of $5,000 "per violation" of the Freedom of Access to Clinic Entrances Act ("FACE" or "the Act"), 18 U.S.C. § 248 (2000). Several defendants filed cross appeals, arguing that

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* Honorable James L. Oakes, United States Circuit Judge for the Second Circuit, sitting by designation.

Appendix A

FACE is a violation of Congress's authority under the U.S. Constitution's Commerce Clause and of the First Amendment. We conclude that damages under FACE are properly awarded jointly and severally among defendants and that FACE is constitutional. Accordingly, we affirm the district court.

BACKGROUND

On April 18, 1997, the United States, through the United States Attorney General, filed a complaint for injunctive relief and statutory damages against thirty defendants[1] who, the Attorney General alleged, were an ongoing threat to the Metropolitan Medical Associates ("MMA"), a reproductive health clinic in Englewood, New Jersey, its employees and persons seeking reproductive health services at MMA. Specifically, the Attorney General alleged that each defendant participated in one, two, or three protests that obstructed access to MMA in violation of FACE. In the prayer for relief in the Complaint, the Attorney General elected to pursue statutory damages of $5,000 per defendant in lieu of proving actual damages to MMA.

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1. The defendants named in the complaint are Joseph R. Gregg, Ruby C. McDaniel, Luis Menchaca, Francis S. Pagnanelli, William Charles Raiser, Michael Henry, Rose Kidd, Arnold Matheson, Katharine O'Keefe, Eva Alvarado, Joseph Roach, Robert Rudnick, James Soderna, James Sweatt, Elizabeth Wagi, Byron Adams, Kevin Blake, Amy Boissonneault, Baldo Dino, Stephen C. Elliot, Sheryl Fitzpatrick, Mary Foley, Dennis Green, George Lynch, Raymond Micco, Alexis Mulrenan, Ralph Traphagen, James Trott, and Kimiko Trott. The Attorney General dismissed the charges against Mary Foley and her name has been removed from the caption. They will be referred to in this opinion collectively as "the defendants" unless it is necessary to provide names.

Appendix A

The district court held an evidentiary hearing on July 8-10, 1997, on the Attorney General's motion for a preliminary injunction. The evidence at the hearing demonstrated that five of the named defendants blocked access to MMA on August 7, 1996, twelve of the named defendants blocked access to MMA on January 18, 1997, and nineteen of the named defendants blocked access to MMA on March 15, 1997. Accordingly, on December 22, 1997, the district court enjoined defendants and their employees, agents, and others acting in concert with them, from blocking and impeding access to MMA, intimidating or attempting to intimidate or interfere with persons seeking access to MMA, and entering or being on MMA premises.

After the preliminary injunction was granted, the parties informed the district court that they disagreed over the proper interpretation of the civil remedies available under FACE. At the district court's request, the parties submitted briefs addressed to the proper interpretation of statutory damages under FACE. On June 18, 1998, after considering the parties' pleadings, the district court issued a memorandum wherein, rejecting the Attorney General's argument that statutory damages should be assessed on each defendant per violation, it concluded that the $5,000 statutory damages were to be assessed per violation and that all defendants who participated in each violation would be held jointly and severally liable for $5,000.

On December 11, 1998, the district court granted the Attorney General's motion for summary judgment and issued a Memorandum and Order Entering Final Judgment. *See United States v. Gregg*, 32 F. Supp. 2d 151 (D.N.J. 1998).

Appendix A

The district court found that the defendants violated FACE when they conducted the three blockades. *See id.* at 153-58. The district court determined that Congress intended statutory damages of $5,000 to be assessed per violation and against all responsible persons severally. *See id.* at 160-61. Accordingly, the defendants were held jointly and severally liable for $5,000 in statutory damages for each violation in which they participated. *See id.* at 161 (holding five defendants jointly and severally liable for the August 7 blockade, twelve defendants jointly and severally liable for the January 18 blockade, and eighteen defendants jointly and severally liable for the March 15 blockade).

The Attorney General timely appealed the district court's decision and eight of the defendants[2] cross appealed. The Attorney General appeals that portion of the district court's decision that imposed the statutory damages jointly and severally. Defendants do not dispute the district court's findings that they violated FACE. Rather, Defendants contend that the Attorney General does not, under FACE, have the authority to elect statutory damages in lieu of proof of actual damages. In addition, they argue that FACE is an unconstitutional exercise of Congress's commerce power and that it violates defendants' rights guaranteed under the First Amendment of the Constitution.

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2. Rose Kidd, James Sweatt, Elizabeth Wagi, Raymond Micco, William Raiser, James Soderna, and Keven Blake filed a cross appeal on February 18, 1999. Francis S. Pagnanelli filed a separate cross appeal on February 18, 1999. Their arguments were consolidated in one appellate brief.

Appendix A

DISCUSSION

We review the district court's award of summary judgment *de novo*. *See Figueroa v. Blackburn*, 208 F.3d 435, 439 (3d Cir. 2000).

I.

The task of resolving how statutory penalties are to be awarded under FACE is a question of statutory interpretation which begins by discerning the plain meaning of FACE's statutory penalty provision. If Congress's intent as to this issue is plain, referral to other canons of statutory construction is unnecessary. *See Resolution Trust Corp. v. Nernberg*, 3 F.3d 62, 64 (3d Cir. 1993); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter[.]").

To determine a law's plain meaning, we begin with the language of the statute. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *New Rock Asset Partners v. Preferred Entity Advancements*, 101 F.3d 1492, 1498 (3d Cir. 1996); *Santa Fe Medical Services, Inc. v. Segal (In re Segal)*, 57 F.3d 342, 345 (3d Cir. 1995). If the language of the statute expresses Congress's intent with sufficient precision, the inquiry ends there and the statute is enforced according to its terms. *See Ron Pair Enterprises, Inc.*, 489 U.S. at 241. Where the statutory language does not express Congress's intent unequivocally, a court traditionally refers to the legislative history and the atmosphere in which the statute was enacted in an attempt to determine the

congressional purpose. *See New Rock*, 101 F.3d at 1498. Once the plain meaning of the statute is determined, it is conclusive "except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Id.* (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Section 248(a) of FACE, in relevant part, provides:

> (a) Prohibited Activities. — Whoever —
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> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with or attempts to injure, intimidate, or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services
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> . . .
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> shall be subject to the . . . civil remedies provided in subsection (c)

18 U.S.C. § 248(a) (2000). FACE further prohibits the intentional damage or destruction of a facility because it provides reproductive health services. *See id.* Any person aggrieved by the foregoing actions may bring a civil action for relief. *See* 18 U.S.C. § 248(a)(1)(A) (2000).

In any action under FACE, a person aggrieved by conduct prohibited under the Act, may obtain "temporary,

preliminary or permanent injunctive relief and compensatory and punitive damages." 18 U.S.C. § 248(c)(1)(B) (2000). In addition, FACE allows a plaintiff in a civil action to elect, "in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation." 18 U.S.C. § 248(c)(1)(B) (2000). The Act permits the U.S. Attorney General and state attorneys general to bring civil actions for the same relief if they believe that a person or group of persons has been aggrieved by violations of the Act. *See* 18 U.S.C. §§ 248(c)(2), (3) (2000); H.R. Rep. No. 103-306, at 13 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, 710. In civil actions brought by an attorney general,

> The court, to vindicate the public interest, may also assess a civil penalty against each respondent —
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> (i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and
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> (ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

18 U.S.C. § 248(c)(2)(B) (2000).

The Attorney General argues that the district court incorrectly awarded statutory damages per violation presumably to be shared by the defendants involved with each blockade and contends that FACE and its goals require statutory damages to be awarded $5,000 per defendant.

We agree with the district court that the "dichotomy of expression" between the civil remedy provisions of FACE demonstrates Congress's intent that statutory damages be imposed per violation and jointly and severally among the defendants who participated in the blockade. *Gregg*, 32 F. Supp. 2d at 160; *see also Milwaukee Women's Medical Services, Inc. v. Brock*, 2 F. Supp. 2d 1172, 1178 (E.D. Wis. 1998) (awarding statutory damages per violation rather than per defendant); *Greenhut v. Hand*, 996 F. Supp. 372, 379 (D.N.J. 1998) (same); *Planned Parenthood of Southeastern Pennsylvania, Inc. v. Walton*, 1998 WL 88373 at *1-2 (E.D. Penn. Feb. 12, 1998) (same).

In authorizing compensatory statutory damages of $5,000 in lieu of actual damages, Congress uses the phrase "*per violation*." 18 U.S.C. § 248(c)(1)(B). This is in sharp contrast to the language used in the provision permitting courts to assess substantial civil penalties to vindicate the public interest in cases brought by attorneys general. *See* 18 U.S.C. § 248(c)(2)(B). In § 248(c)(2)(B), an attorney general can request civil penalties of up to $25,000 "*against each respondent*." *Id.* The language of § 248(c)(2)(B) illustrates that Congress knew how to explicitly instruct a court to assess damages per defendant rather than per violation. The absence of analogous "per respondent" language in § 248(c)(1)(B) and the use instead of the phrase "per violation" indicates that Congress carefully considered the issue and decided that compensatory statutory damages will be imposed per violation, a manner that differs from the civil penalties imposed to vindicate the public interest.

Appendix A

We disagree with the Attorney General that the use of "whoever" in § 248(a) means that compensatory statutory penalties are to be imposed individually. Section 248(a) defines the substantive liability under FACE. It does not address how, under the Act, civil compensatory damages are to be awarded. The use of the singular in that provision thus does not overcome the specific "per violation" language in the relevant remedy provision of the Act. Thus, the statutory language indicates that Congress intended that compensatory statutory damages, like those imposed in this case, are awarded per violation, presumably to be shared jointly and severally among the defendants who participated in the violation.

This interpretation is consistent with FACE's legislative history and the atmosphere of anti-abortion violence in which FACE was enacted. FACE was enacted in 1994 against a backdrop of escalating violence directed toward reproductive health clinics, their employees, and patients. Both the House and Senate Reports set forth detailed accounts of the virulent national campaign waged by anti-abortion activists. *See* H.R. Rep. No. 103-306, U.S.C.C.A.N., at 699. The evidence before Congress demonstrated that "this campaign of violence has lead to death, injury, harassment, fear, and thousands of arrests all across the nation." H.R. Rep. No. 103-306, at 6, U.S.C.C.A.N., at 703. Congress also set forth findings that state and local authorities had proved inadequate, and sometimes unwilling, to curb the violence. *See* S. Rep. No. 103-117, at 17-18 (1993); H.R. Rep. No. 103-306, at 6, 10, U.S.C.C.A.N., at 703, 707 ("state and local enforcement authorities have failed to address effectively the systematic and nationwide assault that is being waged

against health care providers and patients."). Consequently, Congress enacted FACE with substantial federal remedies to prevent the "use of blockades, violence and other forceful or threatening tactics against medical facilities and health care personnel who provide abortion-related services . . . ." S. Rep. No. 103-117, at 2. In sum, FACE serves two important goals: First, federal remedies help compensate individuals and health care facilities for the harm caused by blockades and, second, they serve to deter protesters from repeatedly violating the law.

The Attorney General argues that Congress intended statutory damages to be assessed per individual so that punishment would be imposed with the result of deterring defendants from violating FACE in the future. We agree with the Attorney General that deterrence is a primary goal of substantial federal penalties against clinic blockaders. This goal is well served by the availability of criminal sanctions, punitive damages, and civil penalties. *See* 18 U.S.C. §§ 248(b), (c). Congress explained, however, that the statutory penalties described in § 248(c)(1)(B) are available "in lieu of actual damages." According to the Senate Report, they were included to ease the often difficult task of proving actual loss in a case where anti-abortionists' tactics close a clinic temporarily or interfere with a person's access to reproductive health services. The senate report stated that statutory damages were included "[b]ecause of the expense and other difficulties of proving actual damages (for example, a clinic's lost income)." S. Rep. No. 103-117 at 26. Accordingly, the statutory penalties elected by the Attorney General in this case were included with the goal of compensating the victims of the misconduct prohibited by

FACE. As the district court noted "[o]ne person can just as effectively injure, interfere with, or intimidate as can a group, depending on the circumstances." *Gregg*, 32 F. Supp. 2d at 160. Damages to compensate thus have no bearing on how many individuals caused the damage. Because the legislative history of FACE indicates that the purpose of the statutory damages is to compensate, it follows that Congress intended that compensatory statutory damages be awarded per violation regardless of how many people participated in the misconduct.

Finally, the Attorney General argues that joint and several liability among defendants encourages individuals to engage in large, rather than small, blockades. With joint and several liability, the Attorney General contends, the total damages award "per violation" remains the same, yet the more persons who violate the law, the smaller the amount each defendant must pay, thus perversely tending to encourage, rather than discourage, defendants to organize blockades using greater, rather than smaller, groups of people.

We are not convinced that awarding compensatory statutory penalties per violation rather than per defendant will cause defendants strategically to recruit more defendants for each violation. Because of the wide variety of remedies available under FACE, clinic blockaders will not know the penalties that they face for their misconduct and be able to plan accordingly. They will not know before the suit is filed whether an Attorney General or private plaintiff will opt for statutory damages in lieu of actual damages. *See* 18 U.S.C. § 248(c)(1)(B). They will also not know if they will be made

subjects of a criminal prosecution and face criminal fines. *See* 18 U.S.C. § 248(b). Furthermore, in the case where an attorney general brings a civil action, he or she has the option of requesting that the court assess a civil penalty against each defendant in an amount as great as $25,000 in an appropriate case. *See* 18 U.S.C. § 248(c)(2)(B). Moreover, joint and several liability does not solely contemplate a group of liable defendants sharing the award among them. A liability is joint and several when "the creditor may sue one or more of the parties to such liability separately, or all of them together, at his [or her] option." *Black's Law Dictionary* 751 (5th ed. 1979). It is thus highly unlikely that a defendant or group of defendants would plan a clinic blockade or other violation of the Act in light of the penalty provisions under the Act. Because of the varying ways penalties under the Act may be assessed against a group of defendants involved in one violation, we are not convinced that the deterrent value of FACE is compromised by awarding the compensatory statutory damages jointly and severally as the Act plainly provides that they should be.

In sum, we conclude that Congress intended FACE's compensatory statutory damages be awarded per violation and jointly and severally among defendants. We base our conclusion primarily on Congress's use of "per violation" language in § 248(c)(1)(B) as opposed to the "per respondent" phrase in § 248(c)(2)(B). Furthermore, because Congress made statutory penalties available principally to ease the plaintiff's burden of proving actual damages and other penalties to deter the misconduct prohibited by FACE are available, the $5,000 statutory damages are awarded per violation and jointly and severally among the participating defendants.

Appendix A

II.

Defendants argue that the Attorney General may not elect statutory damages in lieu of actual damages. Their argument misapprehends the statute and is belied by the Act's legislative history. Under FACE, the Attorney General of the United States and a state attorney general may commence a civil action against an individual or individuals who engage in the conduct prohibited by the Act. *See* 18 U.S.C. § 248(c)(2). The Act provides that in an action initiated by an attorney general, "the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved *as described in paragraph (1)(B)*." 18 U.S.C. § 248(c)(2)(B) (emphasis added). Defendants contend that the phrase "compensatory damages" as used in § 248(c)(2)(B) refers only to actual damages and not to statutory damages. However, § 248(c)(1)(B) defines compensatory damages as actual and statutory damages. *See* 18 U.S.C. § 248(c)(1)(B). Thus, by using the term "compensatory damages" in § 248(c)(2)(B), Congress plainly meant to incorporate all of the text relevant to compensatory damages as set out in § 248(c)(1)(B). Therefore, the phrase "compensatory damages" as used in § 248(c)(2)(B) authorizes the attorney general to elect an award of statutory damages.

Furthermore, the legislative history demonstrates that Congress intended that statutory damages be awarded in a civil action initiated by an attorney general. The House confirmed that "[t]he Act authorizes the U.S. Attorney General and State Attorneys General to bring civil causes of action on behalf of aggrieved persons for the *same relief*

available in private actions; however, fees for attorney and expert witnesses may not be awarded to the United States." H.R. Rep. No. 103-106, at 3, U.S.C.C.A.N., at 700 (emphasis added). Because the relief available in private actions includes statutory damages and Congress intended that an attorney general be entitled to the same relief as a private party, we reject the defendants' position that the Attorney General may not elect statutory damages in this case.

III.

A. Commerce Clause.

We now turn to the question whether FACE falls within Congress's power under Article I, § 8 of the United States Constitution. The Commerce Clause empowers Congress to "regulate Commerce . . . among the several states." U.S. Const., Art. I, § 8, cl. 3. Whether FACE is a proper exercise of Congress's commerce power has been much discussed in published opinions of United States Courts of Appeals. Indeed, this is one of the last federal appellate tribunals to address the issue. After considering most, if not all, of the arguments presented by the defendants in this case, these courts held that FACE is valid under the Commerce Clause. *See United States v. Hart*, 212 F.3d 1067, 1074 (8th Cir. 2000); *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999); *Hoffman v. Hunt*, 126 F.3d 575, 582-88 (4th Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *United States v. Bird*, 124 F.3d 667, 672-82 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998); *Terry v. Reno*, 101 F.3d 1412, 1415-18 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997); *United States v. Soderna*,

82 F.3d 1370, 1373-74 (7th Cir.), *cert. denied*, 519 U.S. 1006 (1996); *United States v. Dinwiddie*, 76 F.3d 913, 919-21 (8th Cir.), *cert. denied*, 519 U.S. 1043 (1996); *United States v. Wilson*, 73 F.3d 675, 679-88 (7th Cir. 1995), *cert. denied*, 519 U.S. 806 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1519-22 (11th Cir. 1995). Today, this Circuit aligns with the decisions of its sister courts of appeals and holds that FACE is a proper exercise of Congress's Commerce Clause power.

In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), a decision aptly described by this Court as changing the Commerce Clause landscape, *see United States v. Parker*, 108 F.3d 28, 29 (3d Cir. 1997), the Supreme Court identified three broad categories of activity that Congress may regulate under its commerce power. Congress may: 1) "regulate the use of the channels of interstate commerce," *Lopez*, 514 U.S. at 558 (citations omitted); 2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce even though the threat may come only from intrastate activity," *Id.* (citations omitted); and 3) "regulate those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559 (citations omitted).

Although the judicial branch is the final arbiter of the constitutionality of a statute, courts review a congressional determination that it had the power to enact a particular piece of legislation with substantial deference. *See Parker*, 108 F.3d at 30; *United States v. Bishop*, 66 F.3d 569, 576-77 (3d Cir. 1995). It is not our job to "second-guess the legislative judgment of Congress" that blockades and violence directed

at reproductive health clinics can be regulated under the Commerce Clause power but, rather, to ensure that Congress had a rational basis for that conclusion. *Parker*, 108 F.3d at 30 (quoting *Bishop*, 6 F.3d at 577). We hold that under *Lopez* and this Circuit's precedent, FACE is a proper exercise of Congress's power to regulate intrastate conduct that, in the aggregate, has a substantial effect on interstate commerce.[3]

In *United States v. Morrison*, __ U.S. __, 120 S. Ct. 1740, 1749-52 (2000), the Supreme Court's most recent communique on *Lopez*'s third category of regulation, the Court provided a framework to determine whether a law regulates an activity that has a substantial effect on interstate commerce. The Court identified four relevant considerations. These are: 1) the economic nature of the regulated activity, *see id.* at 1750; 2) a jurisdictional element limiting the reach of the law to a discrete set of activities that additionally has an explicit connection with or effect on interstate commerce, *see id.* at 1750-51; 3) express congressional findings regarding the effects upon interstate commerce of the activity in question, *see id.* at 1751; and 4) the link between the regulated activity and interstate commerce, *see id.* at 1751.

Morrison first asks a court to consider whether the federal law regulates intrastate economic or commercial activity. *See id.* at 1750. In *Morrison*, the Supreme Court noted, "In every case where we have sustained federal

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3. Because we determine that FACE is a proper regulation of intrastate activity that has a substantial effect on interstate commerce, we do not reach the Attorney General's argument that FACE is also a proper regulation of instrumentalities in commerce.

regulation under Wickard's aggregation principle, the regulated activity was of an apparent commercial character." *Id.* Accordingly, in *Morrison*, the Supreme Court invalidated the civil remedy provision of the Violence Against Women Act ("VAWA"), in part, because gender-motivated crimes "are not in any sense of the phrase, economic activity." *Id.* at 1751. In contrast to gender-motivated crime, the activity regulated by FACE — the physical obstruction and destruction of reproductive health clinics and the intentional interference and intimidation of persons obtaining and providing reproductive health services — is activity with an effect that is economic in nature. Reproductive health clinics are income-generating businesses that employ physicians and other staff to provide services and goods to their patients. Motivated by anti-abortion sentiment, the primary goal of individuals and groups engaged in the misconduct prohibited by FACE is to temporarily and permanently interrupt the operations of reproductive health facilities and prevent individuals from accessing their services. *See* S. Rep. No. 103-117, at 11; H. R. Rep. No. 103-306, at 9, U.S.C.C.A.N., at 706. Congress found that the violent and obstructive acts directed at reproductive health facilities had caused millions of dollars of damage and forced clinics to close, caused serious and harmful delays in the provision of medical services and intimidated a number of physicians from offering abortion services. *See* S. Rep. No. 103-117, at 14; H.R. Rep. No. 103-306, at 7, U.S.C.C.A.N., at 704. The effect of the conduct proscribed by FACE is to deter, and in some cases to stop completely, the commercial activity of providing reproductive health services. We thus hold that although the connection to economic or commercial activity plays a central role in whether a law is valid under the

Commerce Clause, we hold that economic activity can be understood in broad terms. Pursuant to this principle, unlike the activity prohibited by VAWA, the misconduct regulated by FACE, although not motivated by commercial concerns, has an effect which is, at its essence, economic. *See Weslin*, 156 F.3d at 296 (threats of violence that have the effect of deterring commercial activity is properly regulated under commerce clause); *Hoffman*, 126 F.3d at 587 (activity regulated by FACE, while not itself economic or commercial, "is closely and directly connected with an economic activity . . . therefore . . . we cannot conclude that FACE has nothing to do with commerce or any sort of economic enterprise"); *Dinwiddie*, 76 F.3d at 921 ("FACE prohibits interference with a commercial activity — the provision and receipt of reproductive health services."); *Cheffer*, 55 F.3d at 1520 ("the Access Act does regulate commercial activity, the provision of reproductive health services.").

Morrison next instructs a court to consider the existence of a jurisdictional element. 120 S. Ct. at 1750-51. "A jurisdictional element . . . refers to a provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute." *United States v. Rodia*, 194 F.3d 465, 471 (3d Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 2008 (2000). FACE does not contain an explicit jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce. Although such an element would certainly lend support to the conclusion that FACE is tied to interstate commerce, we conclude that it was not necessary for Congress explicitly to limit the civil remedy

provision in the case of regulating anti-abortion activity directed at reproductive health clinics that are, by definition, directly engaged in the business of providing reproductive health services. *See Bird*, 124 F.3d at 675 (reasoning that a jurisdictional element is "not *always* a necessary" method to ensure that Congress does not exceed its commerce power).

Morrison also directs that the existence of congressional findings on the burden of the regulated activity on interstate commerce "may enable [a court] to evaluate the legislative judgment that the activity in question substantially affects interstate commerce." *Morrison*, 120 S. Ct. at 1752 (*quoting Lopez*, 514 U.S. at 563). Congress's conclusion that the activity proscribed by FACE burdens interstate commerce is a conclusion derived from months of legislative hearings, research, and debate. The Senate Judiciary Committee and the House Committee on Labor and Human Resources which considered the legislation before it became law submitted extensive reports on the necessity of FACE. *See Bird*, 124 F.3d at 678. Thus, Congress's conclusion that FACE is constitutional is entitled to judicial deference. *See Parker*, 108 F.3d at 29.

Finally, in accordance with the fourth factor of *Morrison*, the findings set forth in the House and Senate Committee Reports demonstrate that Congress had a rational basis upon which to conclude that the activities governed by FACE have a substantial effect on interstate commerce. As set out in detail below, the findings show that a national market for abortion-related services exists in this country and that reproductive health clinics are directly engaged in interstate

commerce. The findings further demonstrate that a national movement engaged in the activities proscribed by FACE has decreased the availability of abortion-related services in the national market and caused women seeking services and physicians providing services to travel interstate. Accordingly, the activity proscribed by FACE has a substantial effect on the interstate commerce of reproductive health services.

The legislative record establishes that a shortage of abortion-related services exists in this country that is exacerbated by the misconduct proscribed by FACE. *See* S. Rep. No. 103-117, at 17. Only 17 percent of counties in the United States have an abortion provider. *See* H.R. Rep. No. 103-306, at 8, U.S.C.C.A.N., at 705. This leaves 83 percent of counties without a physician willing to perform abortions. *See* S. Rep. No. 103-117, at 17 & n.29. The shortage is most severe in rural counties because reproductive health clinics are located primarily in metropolitan areas, leaving women residing in rural areas without a provider of these services. *See* H.R. Rep. No. 103-306, at 8, U.S.C.C.A.N., at 705. In a rural community, only one provider usually exists in a large geographical area, thus making it a preferred target for anti-abortionists because elimination of that provider eliminates abortion services for all women in that area. *See* H.R. Rep. No. 103-306, at 8, U.S.C.C.A.N., at 705.

The shortage of abortion-related services has resulted in a national market for these services because many of the patients must engage in interstate commerce by traveling from one state to obtain reproductive health services in another. Testimony and evidence before Congress showed that substantial numbers of women travel interstate to seek

the services of reproductive health clinics. *See* S. Rep. No. 103-117, at 31; H.R. Rep. No. 103-603, at 6, U.S.C.C.A.N., at 703. Many patients travel over 100 miles to their appointments. *See* S. Rep. No. 103-117, at 17 & n.29. For one example, Ms. Sylvia Doe, who testified before Congress that after learning her baby suffered from a permanent disability that would cause its early death, traveled from Virginia to a clinic in Kansas capable of performing the procedure she required. *See* H.R. Rep. No. 103-306, at 7-8, U.S.C.C.A.N., at 704-05. Furthermore, the Senate found that 44 percent of the patients treated at a clinic in Wichita, KS, are from out of state. *See* S. Rep. No. 103-117, at 31. Congress's determination that reproductive health services are an interstate market was well supported by the testimony presented to the committees. *See Bird*, 124 F.3d at 668-79 (setting forth a summary of testimony).

In addition, reproductive health clinics employ a national market of physicians and staff. Because of the shortage of physicians willing to perform abortions in the age of clinic violence, doctors employed at reproductive health clinics often travel across state lines to provide abortion services. *See* S. Rep. No. 103-117, at 31 & n.46. "Some doctors traveled to several states, some for hundreds of miles, to perform abortions at clinics which had no physicians of their own." *Id.* For example, in South Dakota the only physician who performs abortions commutes from Minnesota and provides abortion services in Minnesota, Montana, North Dakota, and parts of Canada. *See id.* at 16-17 & n.29, 31.

The Senate Committee also concluded that reproductive health clinics engage in interstate commerce. The Committee reported that

> Clinics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. No. 103-117, at 31. Thus, Congress found that a national market existed for reproductive health services because of the shortage of physicians who provide abortion-related services, that reproductive health clinics often employ physicians from outside the state in which they are located, and reproductive health clinics themselves are engaged in interstate commerce.

Finally, Congress determined that the conduct prohibited by FACE inhibits and prohibits the delivery of reproductive health care services in the national market. Based on the testimony and evidence before it, Congress found that the clinic blockades, the threats against employees, and the other violent and obstructive activities prohibited by FACE have the single goal of eliminating the practice of abortion by closing abortion clinics. *See* S. Rep. No. 103-117, at 11; H.R. Rep. No. 103-306, at 6, U.S.C.C.A.N., at 703. Congress also, based on the evidence before it, rationally determined that the national movement was succeeding. The House Report stated that the "campaign of violence has led to death, injury, harassment, fear, and thousands of arrests all across the nation. It has resulted, as intended, in access to the

constitutionally protected right to choose being denied to thousands of women nationwide against their will." H.R. Rep. No. 103-306, at 6, U.S.C.C.A.N., at 703. The Senate Report states that clinic blockades and violent protests proscribed by the Act have "a significant adverse impact not only on abortion patients and providers, but also on the delivery of a wide range of health care services." S. Rep. No. 103-117, at 14. The effect of the violence forced "clinics to close, caused serious and harmful delays in the provision of medical services, and increased health risks to patients." *Id.*

Furthermore, when FACE was enacted, millions of dollars of damage had been caused to these facilities by the clinic blockades. *See* H.R. Rep. No. 103-306, at 7, U.S.C.C.A.N., at 704. The damage caused to reproductive health care facilities eliminates on a temporary or permanent basis the reproductive health care services that are provided by the facilities. *See id.* at 9, U.S.C.C.A.N., at 706. Thus, the activities proscribed by FACE inhibit the operation of entities that are directly engaged in interstate commerce.

Congress explicitly noted the link between the abortion-related violence and the shortage of physicians willing to perform abortions. A number of physicians and health care personnel have been intimidated by the threats of violence made to them and their families and have stopped providing their services, thus contributing to the shortage of providers. The House Committee found that rural clinics and doctors have become the preferred targets for abortion foes because elimination of that single provider effectively eliminates service for many women. *See id.* at 8, U.S.C.C.A.N., at 705.

The Senate Committee also reported that the violence "has . . . taken a severe toll on providers, intimidated some into ceasing to offer abortion services, and contributed to an already acute shortage of qualified abortion providers." S. Rep. No. 103-117, at 14. Specifically, "some providers have succumbed to the intimidation and threats." *Id.* at 17. At least three physicians in Dallas stopped performing abortions in 1992 as a result of pressure by an anti- abortion group, two doctors stopped working in 1993 after receiving death threats, and since Dr. Gunn, an abortion-provider in Florida, was shot in 1993, at least eight more doctors have stopped offering abortion services. *See id.* at 16-17. The House Committee also reported that the shortage of abortion providers is "at least partially attributable to the violence and intimidation described in this report. Doctors understandably are leaving the field, and new graduate[s] have little desire to enter the field even as part of a wider obstetrics/gynecology practice." H.R. Rep. No. 103-306, at 8, U.S.C.C.A.N., at 705.

Moreover, although under *Lopez* Congress may regulate intrastate activity that in the aggregate has an effect on interstate commerce, the anti-abortion movement itself whose conduct is regulated by FACE is national in scope. Congress found that many of the activities were organized and directed across state lines. *See* S. Rep. No. 103-117, at 13, 14 & n.26; H.R. Rep. No. 103-306, at 9, U.S.C.C.A.N., at 706. The House reported that a national strategy has emerged, orchestrated by anti-abortion leaders. *See* H.R. Rep. No. 103-306, at 9, U.S.C.C.A.N., at 706. Congress found that the conduct regulated by FACE was beyond the control of local and state authorities. Thus, when it enacted FACE, Congress sought to regulate a truly national problem.

In sum, due to the acute shortage of abortion-related services in this country and the resulting national market for abortion-related services, the conduct proscribed by FACE — the commission of blockades and other acts of violence — has a substantial effect on the availability in interstate commerce of reproductive health services. The effect of the misconduct is to deter physicians from providing further services and temporarily and permanently to shut down reproductive health clinics, thus forcing large numbers of women to travel across state lines to obtain services. We, thus, must agree with the testimony before the Senate that,

> the shift of demand for abortion services from those areas where clinic access is obstructed to those areas where it is not represents the sort of interstate commerce effect that is beyond the effective control of any one state and is accordingly a proper subject for congressional regulation under the Commerce Clause.

Bird, 124 F.3d at 681 (quoting Senate Hearings, at 97 (statement of Professor Tribe)).[4]

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4. We respectfully register our disagreement with the dissent. The dissent characterizes the connection between clinic blockades and interstate commerce as the same attenuated "but-for-causal chain" between gender-motivated crimes and interstate commerce rejected by the Court in Morrison. This view narrowly focuses on the activity regulated by FACE in the abstract and fails to acknowledge the national market for reproductive health services in this country. Congress determined that the abortion provider shortage in the United States has resulted in a national market for

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Our determination that FACE regulates activity that has a substantial effect on interstate commerce is supported by Supreme Court cases young and old. Recently, in *Jones v. United States*, __ U.S. __, 120 S. Ct. 1904, 1909 (2000), the Supreme Court considered whether the arson of an owner-occupied residence not used for any commercial purposes qualified as arson of property used in interstate commerce within the meaning of the federal arson statute. The Court held that arson of a private dwelling was beyond the reach of federal commerce power to criminalize arson. *See id.* at 1911. To determine, however, whether the arson of a particular facility is a commerce-affecting act, the Court instructed that "[t]he proper inquiry . . . is into the function

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(Cont'd)
abortion services. In this context, abortion-related violence committed to close down a reproductive health clinic or deter a woman from accessing its services has a direct effect on interstate commerce. Abortion-related violence in the specific context of a national market for reproductive services simply cannot be compared to gender-motivated crime — the activity regulated by VAWA. Given the national market for abortion services, the nexus between the activity regulated by FACE and interstate commerce is direct.

The dissent also relies on a comparison of anti-abortion violence to rape, robbery, and trespass to conclude that anti-abortion violence is a local problem properly regulated by the anti-abortion movement. This comparison fails to acknowledge the motivation of the anti-abortion movement. Although the individual tactics of anti-abortion activists may have similar characteristics as common law crimes, the comparison ends there. As Congress found, the anti-abortion movement targets specifically a branch of commerce that operates in a national market. Hence, anti-abortion violence is a national, rather than a local, problem.

of the building itself, and then a determination of whether that function affects interstate commerce." *Id.* at 1910. Here, the facilities blockaded and temporarily or permanently closed by the activities of anti-abortion protestors are businesses that provide reproductive health services and are directly involved in interstate commerce. Thus, under the functionality test provided in *Jones*, the blockading and destruction of reproductive health clinics, just like the arson of a commercial building, is a commerce-affecting activity and therefore properly regulated by Congress.

In *Atlanta Motel v. United States*, 379 U.S. 241, 250-58 (1964), the Supreme Court upheld Title II of the Civil Rights Act of 1964 as a proper regulation of an activity that affects commerce. The holding was premised on the conclusion that discrimination in restaurants results in serving fewer customers, therefore adversely affecting interstate commerce. Here, given Congress's specific findings that there exists a national market for reproductive health services suffering from a shortage in services, the effect of temporarily and permanently shutting down reproductive health clinics that are often frequented and staffed by people crossing state lines has a direct effect on interstate commerce under the reasoning presented in *Atlanta Motel*.

In sum, we conclude that the activity regulated by FACE is economic in nature. We further determine that due to the national nature of reproductive health services and anti-abortion protests, the civil penalty provision is within the boundaries of Congress's power to regulate interstate commerce. Applying the deference that is due Congress's findings, *see Parker*, 108 F.3d at 30-31, we further conclude

that, unlike the statutes reviewed in *Lopez* and *Morrison*, FACE regulates conduct that Congress had a rational basis to conclude has a direct and substantial effect on interstate commerce. We hold, therefore, that FACE falls within the scope of congressional authority under the Commerce Clause as a legitimate regulation of activity having a substantial effect on interstate commerce.

B. First Amendment.

Finally, we join the decisions of the courts of appeals that FACE does not regulate speech and expression protected by the First Amendment. *See Hart*, 212 F.3d at 1071-73; *United States v. Balint*, 201 F.3d 928, 934-36 (7th Cir. 2000); *Weslin*, 156 F.3d at 296-98; *United States v. Wilson*, 154 F.3d 658, 662-64 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999); *Hoffman*, 126 F.3d at 588-89; *Bird*, 124 F.3d at 683-84; *Terry*, 101 F.3d at 1418-22; *Soderna*, 82 F.3d at 1374-77; *Dinwiddie*, 76 F.3d at 921-24; *Cheffer*, 55 F.3d at 1521-22. These courts have thoroughly addressed the arguments presented by Defendants in this case and we are in full agreement with their decisions. For this reason, we do not expound on our analysis of these claims.

Defendants first argue that FACE is a view-point based restriction on speech and expressive conduct that is protected under the First Amendment. FACE is not view-point based. The language of the statute and the legislative history demonstrates that FACE governs all individuals and groups that obstruct the provision of reproductive health services and religious worship. The purpose of FACE was to protect clinics, their staff, and patients from the harm suffered when

their right to provide and receive reproductive health services was interfered with. The law applies equally to all who interfere with the provision of these services, regardless of the motivation for the conduct. *See Weslin*, 156 F.3d at 296-97; *Dinwiddie*, 76 F.3d at 923; *see also Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 386 (2d Cir. 1995) (*en banc*), *aff'd. in part*, 519 U.S. 357 (1997) (holding that because the purpose of an injunction enjoining a group of anti-abortion protestors was to prevent the harm that prospective patients would suffer if the anti-abortionists' activities continued, the injunction was content neutral). Thus, Congress did not pass FACE because of disagreement with the message of anti-abortionists. *Accord Hill v. Colorado*, 120 S. Ct. 2480 (2000) (holding Colorado law that makes it unlawful for any person within 100 feet of a health care facility's entrance to knowingly approach within eight feet of another person without that person's consent is a content-neutral restriction). Because FACE prohibits conduct regardless of the view-point of the actor, FACE does not discriminate on the basis of content.

Furthermore, FACE, which is view-point neutral, governs conduct not speech. *See Terry*, 101 F.3d at 1418-19; *Hoffman*, 126 F.3d at 588; *Cheffer*, 55 F.3d at 1521. By its very terms, FACE regulates "force," "threat[s] of force," or "physical obstruction." 18 U.S.C. § 248(a). Activities that injure, threaten, or obstruct are not protected by the First Amendment, whether or not such conduct communicates a message. *See Wilson*, 154 F.3d at 663; *Terry*, 101 F.3d at 1418-19. Although the conduct may have "expressive components," this does not exempt it from governmental prohibition. *Weslin*, 156 F.3d at 297. We hold that FACE is

a valid restriction of conduct that has an expressive component under the three-part test in *United States v. O'Brien*, 391 U.S. 367, 376-82 (1968). FACE serves the important governmental interest in ensuring public safety and a woman's right to seek reproductive health services; this interest is unrelated to the suppression of free speech; and FACE is narrowly tailored to meet these ends. *See Weslin*, 156 F.3d at 297-98; *Terry*, 101 F.3d at 1419-20. FACE is therefore constitutional under *O'Brien*. Accordingly, we hold that FACE is constitutional under the First Amendment.[5]

CONCLUSION

Therefore, we conclude that compensatory statutory damages under FACE are properly awarded per violation and jointly and severally among defendants who participated in the violation. Furthermore, we join our sister circuits and hold that FACE is a constitutional exercise of Congress's commerce power and does not violate the First Amendment. The District Court is affirmed.

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5. Defendants also argue that because the Attorney General described the actions of lawful protesters in its appellate brief, FACE, as applied in this case, is unconstitutionally vague and overbroad. This argument is without merit.

Appendix A

WEIS, *Circuit Judge, Dissenting.*

Were I to reach the damages issue in this case, I would agree with the majority's conclusion that defendants are liable on a joint and several basis per incident, and not per individual. Obviously, if the government had sought actual damages, it would have been restricted to recovering an amount proven at trial, and that sum could be recovered only once. The fact that Congress provided for statutory damages as an alternative to establishing the actual loss does not change the nature of the compensation, nor make it cumulative.

However, I differ with the majority in its conclusion that FACE survives constitutional scrutiny. I am aware that seven Courts of Appeals have upheld the constitutionality of the Act. Some of these decisions were made over dissents arguing that FACE could not be sustained under the analysis in *United States v. Lopez*, 514 U.S. 549 (1995). Although the Courts of Appeals opinions considered *Lopez*, they essentially treated it as a narrow holding that did not affect measures such as FACE.

Doubts that *Lopez* had application beyond its unique factual setting, however, were dissipated by the expansive holding in *United States v. Morrison*, 120 S. Ct. 1740 (2000). There, the Court revisited the question of Congress' power under the Commerce Clause to legislate on matters traditionally within the province of the States. Setting aside portions of the Violence Against Women Act, the Court wrote that "[w]e accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The

Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 1754. Continuing, the Court said, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.*

Together, *Lopez* and *Morrison* mandate limits to the federalization of local crime under the aegis of the Commerce Clause. FACE, like the Gun-Free School Zones Act and the Violence Against Women Act, is an example of congressional intrusion into criminal law traditionally within the province of the States. These statutes are similar in that "neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute[s] has an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

Considered alone, these statements clearly raise the likelihood that FACE is unconstitutional. Upon more detailed review, it becomes clear that *Morrison* permits no other conclusion.

As the majority here observes, the Supreme Court has identified three categories of activities that Congress may regulate under the Commerce power: first, the use of channels of interstate commerce; second, the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activity; and third, activities that substantially affect interstate commerce. *Morrison*, 120 S. Ct. at 1749. No contention has been made that the first category is

involved here, and the Courts of Appeals that have considered the constitutionality of FACE have generally upheld the Act under the third category. For this reason, I will begin with a discussion of that point.

I. Regulation of Activities

Having a Substantial Relation To Interstate Commerce

In determining whether Congress may properly regulate an activity under the third Commerce Clause classification, *Lopez* and *Morrison* present considerations that can be distilled into the following four questions:

1) Is the activity of an apparent commercial character;

2) Does the statute contain an express jurisdictional element that may establish a connection with interstate commerce;

3) Are there congressional findings that illuminate a reasonable legislative judgment that the activity substantially affects interstate commerce, although such an effect is not "visible to the naked eye"; and

4) Is there a link between the activity and a substantial effect on interstate commerce that is not so attenuated that the federal-state balance is destroyed?

See Morrison, 120 S. Ct. at 1749-52 & n.4; *Lopez*, 514 U.S. at 559-68. These considerations will be examined in turn.

Appendix A

A. *The Activity is Not Commercial*

FACE is drafted to prohibit specific conduct outside reproductive health clinics. It provides in relevant part:

> (a) Prohibited activities. — Whoever —
>
> > (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
> >
> > . . . .
> >
> > (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . .
>
> shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . . .

18 U.S.C. § 248.

The services provided by abortion clinics are clearly commercial in nature, conducted as they are in exchange for money. But these services are not the activities targeted by

the legislation. FACE prohibits third parties from interfering with patients and staff entering abortion clinics, as well as from inflicting damage to the property itself. By its plain language, the statute is directed against the conduct of those external to a clinic's operations.

As the proscribed activity, a protestor's conduct does not involve a purchase, sale, or any exchange of value in return for the rendering of a service, and cannot in any sense be deemed economic or commercial in character. Although blockades may reduce a clinic's revenue, the prohibited conduct is fundamentally criminal in nature and does not fit easily within the category of commercial activity.

The fact that criminal conduct may also have financial effects does not transform that activity into one commercial in nature. Murder and robbery have monetary consequences, but that does not transform criminal codes into commercial regulation. *Morrison* made it clear that the nature of the activity to be restricted is determined by an examination of the conduct itself, and not by such external factors as financial effects, which are one step removed from the statute's focus. *Morrison*, 120 S. Ct. at 1750.

In both *Lopez* and *Morrison*, the financial effects of the prohibited conduct were not disputed. Justice Breyer outlined in his *Lopez* dissent the "obvious" links between the economy and gun violence. *Lopez*, 514 U.S. at 619-22 (Breyer, J., dissenting). Justice Souter's dissent in *Morrison* cited a Senate report from the legislative history that estimated the impact of violent crimes against women to be, at minimum, $3 billion annually. *Morrison*, 120 S. Ct. at 1762 (Souter, J.,

dissenting). The Court nonetheless concluded in *Lopez* that the Gun Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise," *Lopez*, 514 U.S. at 561, and said in *Morrison* that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 120 S. Ct. at 1751.

It is apparent that the Court examined the prohibited conduct without reference to its economic effects. Courts reviewing FACE should employ a similarly disciplined analysis.

When considering the limits of congressional power, the Court has adopted a "practical conception of commercial regulation." *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring); *see also Morrison*, 120 S. Ct. at 1750 (*quoting Lopez*). But to sustain FACE, courts must reject that concept. The statute does not resemble a commercial regulation, but instead a typical exercise of a state's police power: prohibiting trespass, intimidation, and violence; and providing criminal sanctions as well as injunctions.

The threshold inquiry articulated in *Lopez* and repeated in *Morrison* is consistent with the Court's prior Commerce Clause decisions. As the Court wrote, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751. Two cases cited by the Court in that context provide a useful contrast to the present dispute.

Appendix A

In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964), and the parallel case of *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964), the Court upheld legislation requiring hotels and restaurants to make accommodations open to black patrons as well as white. The regulated enterprises were clearly within *Morrison*'s definition of economic activity. It was the hoteliers and restauranteurs themselves, in the operation of their business, who had to alter their conduct in order to comply with the law. The legislation did not apply to third parties whose conduct may or may not have been commercial.

FACE does not in any way control the operation of a clinic in its procedures or selection of patients. That distinction, as well as the lack of a jurisdictional element, separates FACE from the Civil Rights legislation upheld in *Heart of Atlanta* and *Katzenbach*.

To cavalierly dismiss the traditional distinctions between criminal and commercial conduct is to "downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis." *Morrison*, 120 S. Ct. at 1750. Both *Lopez* and *Morrison* made the inquiry into commercial character a key element to their holdings. In the present case, the only reasoned answer to the question of whether the blockading is commercial in character must be in the negative.

B. *The Act Contains No Jurisdictional "Hook"*

A jurisdictional element in a statute serves to define the limits of the regulated activity. Including such a requirement assures that the legislation is directed toward a defined scope

of conduct, one more apt to be within the reach of the commerce power granted to Congress. *See United States v. Bishop*, 66 F.3d 569, 594 (3d Cir. 1995) (Becker, Ch. J., concurring in part and dissenting in part). A statutorily required proof of connection with interstate commerce mandates a case-by-case inquiry.

Stressing the redemptive power of such an element, the Court in *Lopez* discussed *United States v. Bass*, 404 U.S. 336 (1971), where it circumspectly read federal gun legislation to require a nexus with interstate commerce. *Lopez*, 514 U.S. at 562. In *Bass*, the Court chose to avoid a potential constitutional infirmity in this fashion because " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.' " *Id.* (*quoting Bass*, 404 U.S. at 349). Similarly, *Jones v. United States*, 120 S. Ct. 1904, 1908, 1910 (2000), carefully interpreted an arson statute so as not to apply to all private residences and thus avoided the constitutional issues, despite interstate connections in the forms of a mortgage, an insurance policy and the use of natural gas.

But in FACE, there is no such ambiguity. Indeed, it appears that Congress simply sought to extend a "remedy over a wider, and more purely intrastate, body of violent crime." *Morrison*, 120 S. Ct. at 1752. Without a jurisdictional clause to provide a case-by-case limitation, the Act's reach becomes vulnerable to a Constitutional challenge.

Because FACE lacks the jurisdictional element, the government in this case was not required to establish any connection with interstate commerce. It was not necessary

to show that interstate travel was hindered or affected, that equipment or furnishings were purchased in interstate commerce, or that any of the other jurisdictional indicia that have been used in statutes that have passed constitutional muster were satisfied. All that the government had to show was that a clinic, even if a purely local enterprise, was being blockaded. The prosecutor thus had almost unlimited discretion to intervene in a purely local disturbance.

The preservation of the constitutional allocation of power between state and federal governments is a serious concern for both the legislative and judicial branches. Including a jurisdictional requirement in a statute is one way Congress can demonstrate that it recognizes this important issue and has acted in light of that knowledge.

The absence of a jurisdictional clause in FACE is a fatal flaw, one that is not cured by the congressional findings that will be discussed next.

C. *The Legislative Findings Are Inadequate*

Unlike *Lopez*, but like *Morrison*, FACE's legislative history contains congressional findings. As a result of hearings, Congress alleged in Committee reports and in floor debates that patients and doctors travel interstate for abortions; that local authorities were sometimes unable to control violence at abortion clinics; and that obstructionist tactics had caused losses in the millions of dollars, caused clinics to close, and had intimidated physicians as well as patients. Based on anecdotal evidence, Congress decided that federal intervention authorized by the Commerce Clause and section 5 of the Fourteenth Amendment was appropriate.

Appendix A

On several occasions, we have said that congressional findings are entitled to judicial deference and that it is not our role to " 'second-guess the legislative judgment of Congress.' " *United States v. Parker*, 108 F.3d 28, 30 (3d Cir. 1997) (*quoting Bishop*, 66 F.3d at 577). Accordingly, all that was required of a reviewing court was to ensure that Congress had a rational basis for its legislation. *Id.*

However correct that approach may be in other settings, it can no longer be said that such substantial deference is due in cases assessing the limits of congressional power under the Commerce Clause. In *Morrison*, the Court stated that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 120 S. Ct. at 1752. Whether the effect upon interstate commerce is substantial enough to make Congress' exercise of power under the Commerce Clause appropriate "is ultimately a judicial rather than a legislative question." *Id.*

As the basis for concluding that blockades have a substantial effect upon interstate commerce, Congress reasoned that obstructions that deter patients from going to a clinic caused diminished business for the enterprise. In some cases, when clinics closed, women were required to travel, perhaps interstate, to obtain the services of another establishment.

This is the very same "but-for causal chain" of logic that the Court explicitly rejected in *Morrison*. *Id.* at 1752-53. If every attenuated effect upon interstate commerce stemming from an occurrence of violent crime satisfied the substantial effects test, then Congress could "regulate any crime as long

as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.*

The opinions of the Courts of Appeals that have upheld FACE all rely heavily on the legislative history for concluding that a substantial effect on interstate commerce existed. *See United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998); *United States v. Bird*, 124 F.3d 667, 678 (5th Cir. 1997); *Terry v. Reno*, 101 F.3d 1412, 1415-16 (D.C. Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913, 920-21 (8th Cir. 1996); *United States v. Wilson*, 73 F.3d 675, 681 (7th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995); *American Life League v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995). But these decisions are undercut by *Morrison*. With the asserted justifications constitutionally infirm, the legislative history does little to demonstrate a reasonable congressional judgment that the prohibited activity substantially affects interstate commerce.

D. *Any Link is Too Attenuated*

As was said in *Lopez*, "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). Any supposed link between the proscribed conduct in FACE and interstate commerce, if one exists, would be so attenuated that it could be used to also justify a general federal police power.

Even assuming that some of the surgical instruments, medications, furnishings and equipment were in interstate commerce at some point, such a connection is so nebulous that it provides no useful boundary under the Commerce Clause. According to *Morrison*, allowing such remote factors to govern constitutional limitations would allow Congress to "completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 120 S. Ct. at 1752.

Persons seeking to block access to abortion clinics may be a national problem, but in that sense, rape, robbery and trespass present national concerns as well. Being a mere commonality of the several States does not justify federal regulation of these matters under the auspices of interstate commerce.

The conduct at issue here — blocking access to a building and verbally intimidating those who attempted to enter — is a quintessentially local problem. Despite that obvious and inescapable fact, the federal government chose to use its resources where they were neither required nor appropriate.

Because the prohibited activity has no commercial character and no jurisdictional element need be proved, the statute as drafted impermissibly extends federal jurisdiction over conduct that is purely and simply intrastate and has no relationship in any substantial manner to interstate commerce. Without a jurisdictional prerequisite, FACE leaves the federal government free to intrude into a state's sovereign duty to maintain order in any abortion clinic-related disturbance, no matter how trivial.

Contrary to the congressional findings, here there was no abdication of responsibility by state authorities. A state court had issued an injunction against obstructing entry to the clinic. On each of the three occasions when the conduct occurred, the local police intervened, arrested protesters, and filed state criminal charges. All of the blockades were controlled by local authorities, including the last one, which caused the local police to seek assistance from neighboring municipalities. The only reported injuries were the result of one demonstrator kicking and head-butting a police officer.

From the standpoint of local law enforcement personnel, the conduct that FACE addresses is not extraordinary, but is akin to disturbances following a high school game between bitter rivals, where fans demonstrate their loyalty in mass unruly gatherings. Celebrations by fans of Super Bowl champions frequently require intervention by city police to maintain order and protect property (some of it undoubtedly in interstate commerce). Near riots at rock concerts by performers who have traveled interstate are routinely controlled by local police forces. Many of the same arguments used to justify FACE could be used to federalize criminal conduct of this nature, despite the competence state authorities have demonstrated over the years.[1]

It is difficult to understand why the federal government invoked FACE when local authorities had the situation well in hand. Duplication of state and federal injunctions wastes

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1. Where state officials are unable to adequately control disturbances with their own resources, 42 U.S.C. § 10501 allows officials to petition the Attorney General for assistance from the federal law enforcement community.

judicial resources and leads to uncertainty and confusion. Moreover, overlapping of enforcement authority is detrimental to the federal system and the liberties it secures. "[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. 'Federalism serves to assign political responsibility, not to obscure it.' " *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring) (*quoting FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). When overlapping occurs, the lines drawn by federalism are blurred and the "resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Id.* at 577 (Kennedy, J., concurring).

FACE is a glaring example of the federalization of local criminal law that is fatally flawed in its implementation because it regulates activities with no commercial character. The statute contains no jurisdictional element which might cabin its operation within the confines of the Commerce Clause, and the congressional findings fail to provide the necessary justification for federal intrusion into local law enforcement.

II. Instrumentalities of Interstate Commerce

The government also argues that FACE may be sustained under the second category noted by the Supreme Court — protection of the instrumentalities of interstate commerce or persons or things in interstate commerce. The Court of Appeals in *United States v. Bird*, 124 F.3d 667, 674 (5th Cir. 1997) concluded that FACE was not sustainable under

this second category because no evidence was submitted at trial to support such a conclusion. The Court in *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996) simply noted that only the third category was relevant to the case before it.

The Court of Appeals in *United States v. Dinwiddie*, 76 F.3d 913, 919-20 (8th Cir. 1996), considered this second category, observing that the clinic in that case was located in a metropolitan area straddling two states. Because of this, a number of patients and staff members did not live in Missouri where the clinic was located, and therefore, traveled interstate to reach it. *Id.* On that basis, the court concluded that the statute protected people and business in interstate commerce and so was within Congress' power to enact under the second category. *Id.*[2]

Dinwiddie, however, failed to consider the significance of the lack of a jurisdictional hook in FACE, although such absence was a factor in *Lopez*. It is noteworthy that the two cases cited by the *Dinwiddie* court to support its holding that the clinic was "in interstate commerce" were based on statutes that did contain jurisdictional limitations.

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2. It is interesting, but not determinative, that in *Dinwiddie*, the record established the interstate travel of a doctor and some patients. No such findings were made in the case before us. In any event, the *Dinwiddie* evidence would not cure the facial deficiency in the text of the Act itself. As a criminal statute, it must give notice of the nature of the conduct proscribed, *United States v. Harriss*, 347 U.S. 612, 617 (1954), including jurisdictional facts that must be proved. The fact that the prosecution produces evidence that could satisfy a hypothetical jurisdictional element cannot cure the lack of the material element in the statute itself.

E.g., *United States v. American Bldg. Maint. Indus.*, 422 U.S. 271, 275-76 (1975) (Clayton Act); *United States v. Robertson*, 514 U.S. 669, 670 (1995) (RICO).

I am not persuaded that a purely local commercial service that is frequented by nearby but out-of-state patrons is within the scope of the Commerce Clause without the saving grace of a jurisdictional clause. *See Morrison*, 120 S. Ct. at 1752 n.5.

It is significant that in *Lopez*, the cases cited in support of the commerce power under the second category involved such matters as the Safety Appliance Act as applied to railroad cars used in intrastate and interstate commerce, *Southern Ry. Co. v. United States*, 222 U.S. 20, 24 (1911), and fixing intrastate railroad fees that affect interstate rates. *Shreveport Rates Cases*, 234 U.S. 342, 345 (1914). Other examples cited by the Supreme Court include destruction of an aircraft or thefts from interstate shipments. *Perez v. United States*, 402 U.S. 146, 150 (1971). None of these situations approaches the broad sweep of FACE, which, it must be said again, lacks any jurisdictional limitation to restrict its application to those matters demonstrably in interstate commerce.

III. Fourteenth Amendment

The government also attempts to sustain the statute as a valid exercise of congressional power under the Fourteenth Amendment. *Morrison* provides a short answer to that contention. The Fourteenth Amendment applies to the states, and like the Violence Against Women Act, FACE is directed

at private conduct where there is no indication of state action. *Morrison*, 120 S. Ct. at 1756. FACE, therefore, cannot be sustained under the Fourteenth Amendment.

I conclude that FACE is unconstitutional under both the Commerce Clause and the Fourteenth Amendment. The judgments in this case should be set aside.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ENTERING FINAL JUDGMENT DATED, DECIDED AND FILED DECEMBER 11, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO: 97-2020 (JCL)

UNITED STATES OF AMERICA,

PLAINTIFF,

v.

JOSEPH R. GREGG, RUBY C. MCDANIEL, LUIS MENCHACA, FRANCIS S. PAGNANELLI, WILLIAM CHARLES RAISER, MICHAEL HENRY, ROSE KIDD, ARNOLD MATHESON, KATHARINE O'KEEFE, EVA ALVARADO, JOSEPH F. O'HARA, JOSEPH ROACH, ROBERT RUDNICK, JAMES SODERNA, JAMES SWEATT, ELIZABETH WAGI, BYRON ADAMS, KEVIN BLAKE, AMY BOISSONNEAULT, BALDO DINO, STEPHEN C. ELLIOT, SHERYL FITZPATRICK, MARY FOLEY, DENNIS GREEN, GEORGE LYNCH, RAYMOND MICCO, ALEXIS MULRENAN, RALPH TRAPHAGEN, JAMES TROTT, KIMIKO TROTT,

DEFENDANTS.

* * *

Appendix B

December 11, 1998, Decided
December 11, 1998, Filed

* * *

JUDGES: John C. Lifland, United States District Judge.

OPINION BY: John C. Lifland

MEMORANDUM AND ORDER ENTERING FINAL JUDGMENT

LIFLAND, District Judge.

Presently before the Court is the motion of the United States of America (hereinafter "United States") for summary judgment pursuant to Fed. R. Civ. P. 56(a) on all claims alleged in its Complaint. For the reasons set forth herein, the motion of the United States will be granted, and appropriate relief will be awarded.

BACKGROUND

On April 18, 1997, the United States, through the Attorney General, filed this action pursuant to the Freedom of Access to Clinic Entrances Act (hereinafter "FACE" or "the Act"), 18 U.S.C. § 248 (1994). The Complaint alleges that Metropolitan Medical Associates (hereinafter "MMA"), its employees and persons seeking reproductive services at MMA, have been and may continue to be injured by conduct constituting violations of FACE. The Complaint was filed to ensure that (a) the named defendants are enjoined from

committing future violations of FACE and (b) that statutory damages, as provided for under FACE, are imposed on defendants for violations of the Act.

On December 22, 1997, this Court issued a preliminary injunction prohibiting the named defendants from physically interfering with or obstructing access to the MMA building and facilities, physically intimidating or attempting to intimidate anyone seeking access to the MMA building and facilities, and entering on or being located on or within the premises of the MMA building and facilities, unless seeking reproductive health services. The Court denied the United States' request for a 60-foot buffer zone. The Court issued its Findings of Facts and Conclusions of Law after the preliminary injunction hearing. The following facts are undisputed unless otherwise noted.[1]

MMA is a reproductive health care clinic that provides ambulatory care abortions and related services. MMA is located in a two-story building at 40 Engle Street, Englewood, New Jersey. MMA has a street-level front entrance, directly adjacent to a public sidewalk. MMA patients and their visitors generally park on the street or in nearby parking lots, and walk down the Engle Street sidewalk

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1. In their Opposition Brief, defendants state "In face of the videotapes and some of the uncontradicted testimony [at the preliminary injunction hearing], we will not spend a great deal of time in disputing the facts that pertained to August 7, 1996, January 18, 1997, March 15, 1997, or for that matter, the April 19, 1997, events." Def. Opp. Br. at 9. Defendants instead dispute facts concerning the additional relief sought by the United States in the form of a 60-foot buffer zone and statutory damages.

to the clinic. MMA also has a small parking lot, which is used by staff only and is accessed by an alley to the side of the clinic building.

Persons entering MMA from the street must proceed past a first-floor security station and up a stairway to the second floor, through double glass doors, where the waiting room and reception area are located. Patients must register at the second floor reception desk and remain in the waiting room until called to the office area for an examination, laboratory tests and, in some cases, counseling. After counseling, patients who undergo medical procedures walk back down the stairway to the medical area on the first floor. The stairway between the first and second floors is the only one routinely used by patients or staff. The first floor street entrance is the only regularly used method for patients to enter and exit MMA. An emergency fire escape is located at the rear of the MMA building, near the staff parking lot.

Anti-abortion protests and demonstrations at MMA are restricted pursuant to orders issued in 1974 by the Superior Court of New Jersey. These orders require, inter alia, that protestors remain on the eastern side of Engle Street, across the street from the clinic. The distance from the front door of MMA across Engle Street to the eastern side of the street is approximately 60 feet.

Three blockades occurred at MMA between August 1996 and March 1997. A fourth blockade of MMA was attempted in April 1997.

Appendix B

August 7, 1996 Blockade of MMA

On August 7, 1996, five of the named defendants — Joseph Gregg, Ruby McDaniel, Luis Menchaca, Franco Pagnanelli and William Raiser — blocked access to MMA by placing themselves inside the clinic building on the second floor landing in front of the clinic's patient waiting room entrance and office area, completely blocking the staircase. The five defendants were seated in two groups, one group of three and one group of two individuals. They had locked themselves together with U-shaped bicycle locks. The bicycle locks were placed around each of their necks and then linked together. Defendants McDaniel and Pagnanelli were locked together in one group; the other three defendants were locked together in a second group. At the preliminary injunction hearing, Englewood Police Officers George Wathney and Steven Sabo were able to identify defendants Pagnanelli and McDaniel as the individuals pictured in Government Exhibit 4B. Tr. at 1.95-1.98, 1.128, 1.110, 1.128, 1.42-1.43, 1.112, 1.117; Govt. Exhs. 4A, 4B.

Numerous police officers and fire department personnel were required to respond to the blockade of MMA. The defendants refused to leave or unlock themselves in response to police requests to do so.

It took fire department personnel considerable time to cut through one set of locks on the defendants. Ultimately, they were unable to remove all of the locks on site. Two of the defendants, still locked together, had to be carried by police officers out of the clinic and to police vehicles.

Appendix B

During the blockade, access to MMA's second floor patient and office areas was completely blocked. Also during the blockade, defendants McDaniel and Pagnanelli, who were locked together, were inside the clinic when the door against which they were leaning was opened from the inside. Pagnanelli and McDaniel moved into the open doorway. Police officers had to forcibly remove these two defendants from the doorway so that the door could be closed. Also during the blockade, the defendants were, at times, loud and belligerent, yelling statements that expressed their opposition to abortion.

As a result of the blockade, some MMA staff members conducted themselves as if they were angry and shaken. Some acted intimidated by defendants' actions, by expressing desires to quit working at MMA.

All five individuals were arrested and charged with trespass and other violations.

January 18, 1997 Blockade of MMA

On January 18, 1997, twelve of the named defendants — Luis Menchaca, Michael Henry, Rose Kidd, Arnold Matheson, Katharine O'Keefe, Eva Alvarado, Joseph O'Hara, Joseph Roach, Robert Rudnick, James Soderna, James Sweatt and Elizabeth Wagi — blocked access to MMA by sitting or lying in front of the clinic building entrance on Engle Street. These defendants blockaded MMA despite the presence of police officers in their official vehicles directly in front of the clinic. Some defendants initially tried to enter the clinic and had to be forcibly kept out of the clinic by

MMA staff and police. The defendants refused to leave the clinic entranceway and had to be physically removed and carried away by police officers.

At the hearing, defendants put into evidence a videotape showing the blockade. The videotape showed individuals crossing Engle Street and sitting and/or lying in front of the clinic entrance. Defendants' Preliminary Injunction Hearing Exhibit ("Defs. Exh.") 1; Tr. at 2.155-2.156, 2.158-2.160, 2.162-2.164. The defendants were part of a crowd of demonstrators who were outside the clinic protesting against abortion, including yelling anti-abortion statements. The twelve blockaders were arrested and charged with trespass and other violations.

March 15, 1997 Blockade of MMA

On March 15, 1997, nineteen of the named defendants — Menchaca, Henri, Kidd, Matheson, O'Keefe, Byron Adams, Kevin Blake, Amy Boissonneault, Baldo Dino, Stephen Elliot, Sheryl Fitzpatrick, Mary Foley, Dennis Green, George Lynch, Raymond Micco, Alexis Mulrenan, Ralph Traphagen, James Trott and Kimiko Trott — blocked access to MMA by sitting or lying in front of the clinic building entrance on Engle Street. This blockade was conducted in two separate waves. The first group of blockaders ran across Engle Street, sat or lay in front of the entranceway, refused to leave when asked by police officers and had to be physically removed by the officers.

The second wave of blockaders ran across the street just as the officers had cleared the clinic's entrance area of the

first group. Like the first group, the second group sat and lay in front of the entranceway, refused to leave when asked by police and had to be physically removed.

As the officers attempted to remove the blockaders on March 15, many of them physically resisted, locking arms and legs, holding onto each other and scrambling back toward the door each time the officers pulled them away.

At times, individuals seeking access to the clinic on March 15 were unable to enter MMA until the area around the clinic entrance was cleared by police. Officers escorted individuals, some of whom were angry, hysterical and crying, into the building.

The March 15 blockade caused one MMA patient concern over having to step over people to enter MMA.

One defendant, Arnold Matheson, kicked a police officer twice in the groin and attempted to "head-butt" the officer during the arrests.

The scene outside the clinic was chaotic and loud, with a crowd of anti-abortion demonstrators contributing to the chaos by yelling, including one demonstrator who yelled through a megaphone at police officers. The demonstrators carried anti-abortion signs and yelled anti-abortion slogans. The crowd of demonstrators cheered for the two waves of blockaders as they crossed the street and blocked the clinic entrance. The demonstrators also yelled at and berated police officers as they removed the blockaders.

Appendix B

Defendants carried out the March 15 blockade in spite of substantial law enforcement presence outside the clinic. In order to respond to defendants, Englewood police had to call for assistance from neighboring towns and municipalities. At some times during the March 15 blockade, police were forced to close Engle Street, a main thoroughfare, in order to better respond to the disturbance created by the defendants and demonstrators.

All nineteen defendants were arrested and charged with trespass and other violations. Five of the nineteen defendants had also participated in either the August 1996 or January 1997 blockades.

April 19, 1997 Attempted Blockade of MMA

On April 19, 1997, the day after this lawsuit was filed, numerous anti-abortion demonstrators attempted to blockade the clinic, including defendant Matheson. Despite police erecting police barricades and lining the street with police vehicles, these individuals ran across the street in more than one group, between and over police vehicles, in an effort to get to the entrance to MMA. Some demonstrators threw themselves under police vehicles, suffering cuts and scrapes. One demonstrator dove under a police van that was running and grabbed onto the underside, requiring officers to crawl under the vehicle to pull him out. Police apprehended and arrested the demonstrators before they could reach the clinic entrance. These individuals were charged with trespass and other violations.

Appendix B

STANDARD OF REVIEW

Summary judgment eliminates unfounded claims without recourse to a costly and lengthy trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548, (1986). However, a court should grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of showing that no genuine issue of material fact exists rests initially on the moving party. See Celotex, 477 U.S. at 323. A litigant may discharge this burden by exposing "the absence of evidence to support the nonmoving party's case." Id. at 325. In evaluating a summary judgment motion, a court must view all evidence in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038, 50 L. Ed. 2d 748, 97 S. Ct. 732 (1977).

Once the moving party has made a properly supported motion for summary judgment, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The substantive law determines which facts are material. Id. at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of

summary judgment." Id. No issue for trial exists unless the nonmoving party can demonstrate sufficient evidence favoring the nonmoving party such that a reasonable jury could return a verdict in that party's favor. See id. at 249.

DISCUSSION

Section 248(a)(1) of the Freedom of Access to Clinic Entrances Act provides:

> (a) Prohibited Activities. — Whoever —
>
> (1) by . . . physical obstruction . . . intentionally injures, intimidates, or interferes with or attempts to injure, intimidate, or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the . . . civil remedies provided in subsection (c). . . .

18 U.S.C. § 248(a)(1).

FACE defines a physical obstruction as:

> [R]endering impassable ingress to or egress from a facility that provides reproductive health services . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous.

18 U.S.C. § 248(e)(4). Entry into or invasion of the clinic, physical injury to clinic clients or staff, or the non-occurrence

of scheduled procedures or abortions are not elements of an obstruction under FACE, and therefore, need not be demonstrated to establish a violation of the Act. See United States v. Roach, 947 F. Supp. 872, 876 (E.D. Pa. 1996). Similarly, as long as access is made "unreasonably difficult or hazardous," it is not necessary to establish that there was absolutely no way to enter an abortion facility in order to prove a violation of the Act. United States v. Soderna, 82 F.3d 1370, 1377 (7th Cir.), cert. denied sub nom, Hatch v. United States, 519 U.S. 1006, 117 S. Ct. 507, 136 L. Ed. 2d 398 (1996) (finding that "unreasonably difficult" access in the context of FACE includes having to surpass such obstacles as individuals "lying down across the entrance so that the entrant has to step — or jump? — over the blockader" and instances in which "only one entrance of several (but that the main one) is blocked"); United States v. Lindgren, 883 F. Supp. 1321, 1328 (D.N.D. 1995).

For purposes of FACE, "intent" means "intending to perform the act and aware of the natural and probable consequences of it." Legislative history of FACE, S. Rep. 103-117, 103rd Cong., 1st Sess. 24 n. 39 (1993) (hereinafter "S. Rep. 103-117"). To "interfere with" means "to restrict a person's freedom of movement." 18 U.S.C. § 248(e)(2).

It is clear from the undisputed facts that the United States has met its summary judgment burden of showing there is no genuine issue of material fact as to whether defendants violated § 248(a)(1) of FACE. The United States pointed to evidence indicating that on August 7, 1996, January 18, 1997, and March 15, 1997, defendants physically obstructed ingress to and egress from MMA, with the intent to interfere with,

or in an attempt to interfere with, clinic staff and patients because those persons were seeking or providing reproductive health services. See Findings of Fact and Conclusions of Law.

Physical Obstruction

As the Court has already recognized, defendants engaged in physical obstruction as defined by FACE during each of the blockades at issue in this case. The United States has established that defendants made ingress into MMA unreasonably difficult, in that persons seeking to enter MMA had to step or climb over the bodies of defendants as they blocked the entrances. These blockades constituted physical obstructions, as defined by FACE. Thus, the first element of a FACE violation has been established. Court's Findings and Conclusions at 20, § 20. Defendants admit in their Opposition Brief that "On August 7, 1996, several of the defendants entered the premises and lay prone on the stairway and hallway. . . . On January 18, 1997, several defendants crossed the street in front of the clinic and blocked the front door of the clinic. . . . Again, on March 15, 1997, several of the defendants crossed the street and blocked the door." Thus, the United States has met its burden and there is no dispute as to this element.

Intent to Interfere With Clinic Employees and Clients or Attempt to Do So

Defendant's intent to interfere with MMA staff and patients is evident from their conduct. "Intent" means "intending to perform the act and aware of the natural and

probable consequences of it." S. Rep. No. 103-117 at 24, n. 39 (1993). In each of the blockades that are the subject of this lawsuit, the "natural and probable consequences" of defendants' action was that the freedom of movement of individuals seeking access to MMA would be restricted. At the hearing, the United States offered videotape and eyewitness testimony to show that the defendants, as well as numerous other individuals outside MMA on January 18 and March 15, 1997, yelled or uttered anti-abortion statements, including imploring women not to go into the clinic or not to kill their babies and carried anti-abortion signs. The United States also pointed to evidence showing that defendants refused to leave or move away from the clinic's entrance areas when repeatedly asked to do so by police officers during each of the three blockades. The Court found the requisite intent in the preliminary injunction hearing based on such evidence. The United States has met its burden for this element.

Because the MMA Provides, and its Patients Obtain, Reproductive Health Services

As stated above, defendants made statements that expressed their opposition to abortion during the blockade in August 1996. Similarly, in January and March of 1997, the record indicates that defendant's blockade took place in the midst of anti-abortion demonstrations. Based on such evidence the Court previously found that "defendant's actions on August 7, 1996, January 18, 1997, and March 15, 1997 were motivated by their desire to stop abortions from occurring." Findings and Conclusions at 21, § 21. Thus, the United States has satisfied its burden for this element.

Appendix B

As the party responding to a motion for summary judgment, defendants bear the burden of "designat[ing] specific facts showing that there is a genuine issue for trial." Country Floors, Inc. v. Partnership of Gepner & Ford, 930 F.2d 1056, 1061 (3d Cir. 1991) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). In their Opposition Brief, defendants do not dispute most of the facts that pertain to August 7, 1996, January 18, 1997, March 15, 1997, or April 19, 1997. See Opp. Br. at 9. Defendants do dispute a few of those facts and the "additional facts that the United States now brings forward" concerning the 60-foot buffer zone the United States seeks.

Defendants dispute whether patients were frightened or turned away or their access blocked to the clinic. Defendants suggest that the individuals who approached MMA's entrance when defendants blockaded the clinic were "phoney [sic] patients, used to deceive the court into granting an injunction." Opp. Br. at 12. The record contains no evidence in support of this argument. The only evidence defendants point to in support of their argument is the fact that the United States did not seek out the identity of three individuals whom the defendants purported to describe in an interrogatory. See Opp. Br. at 12-13. However, the fact that the United States has not identified certain individuals in whom defendants had an interest does not raise an issue of material fact as to obstruction.

Defendants also dispute the number of interior stairways in the MMA building. They state in their Opposition Brief that "Our recollection is that administrator Jones testified at the preliminary injunction hearing that there is no interior

stairway." Opp. Br. at 11. However, the Court found in its Findings and Conclusions that "the [interior] stairway between [MMA's] first and second floors is the only one routinely used by patients and staff." See Findings and Conclusions, at 2, § 3 (citing Tr. at 1.32, 1.37-1.38). Defendants do not point to specific evidence in the record indicating that there is no interior stairway.

Defendants also dispute that defendant Roach "and one or two other" defendants either intended to obstruct access to MMA or crossed the street to the entrance of the clinic. Defendants candidly admit, however, that as of the time they wrote their brief in opposition to the United States' motion, they were unable to substantiate this claim with any reference to the record.[2] In fact, the record shows that defendant Roach admitted participating in the January 18, 1997 blockade of MMA. See Defendant's Responses to United States Requests for Admissions, Nos. 30-33, 36-41, 45. Because defendants have not pointed to specific evidence on this issue, and because the record supports plaintiff's conclusion, the Court finds there is no issue of material fact.

Thus, defendants have failed to meet their burden.

The Court finds that the United States is entitled to summary judgment that defendants have violated § 248(a)(1) of FACE. The rest of this case focuses on the appropriate remedies for such a violation. The United States seeks a

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2. See Defendants' Opposition at 11, n. 1 (claiming that this exculpatory information exists, but stating that "[o]ur notes as to the location of theses [sic] [exculpatory] exceptions in the record are buried in our mass of papers.")

permanent injunction broadening the relief granted in the Preliminary Injunction Order of 12/23/97 to include a 60-foot buffer zone, and seeks statutory damages.

Permanent Injunction

Defendants apparently contend that the United States is not entitled to permanent injunctive relief because defendants have not engaged in unlawful conduct since this case was filed, making the case moot.[3] In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 66, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987), the Supreme Court described, in the context of a case brought under the Clean Water Act, the burden on a party when that party asks the court to dismiss a case as moot: "In seeking to have a case dismissed as moot . . . the defendant's burden 'is a heavy one'. . . . The defendant must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney, 484 U.S. at 66 (citing United States v. Phosphate Export Ass'n, Inc., 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)); Phillips v. Pennsylvania Higher Educ. Assistance Agency, 657 F.2d 554 (3d Cir. 1981). The only evidence that defendants put forth in this regard is that they have complied with the Preliminary Injunction. Defendants assert that their

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3. Although defendants' brief appears to dispute only the broadening of the preliminary injunction to include a 60-foot buffer zone (see Opp. Br. at 15-23), the last paragraph of the brief states that the "court ought to consider dismissing the matter or at least vacating the injunction and denying a final injunction." Thus, it appears that defendants dispute the entry of a permanent injunction even if on the same grounds as the preliminary injunction.

compliance with the Preliminary Injunction is a sufficient basis not only to deny the United States' permanent injunctive relief, but also to dismiss the case and vacate the terms of the prior injunction. Opp. Br. at 25.

Defendants have not met their "heavy" burden. They do not dispute that prior to the initiation of this lawsuit, they blockaded MMA, and that some defendants blockaded MMA on more than one occasion within a seven-month period. See Opp. Br. at 11; Stipulation of Facts at 3-6. Similarly, defendants do not dispute that many defendants have a history of obstructive and threatening conduct at abortion clinics, including the refusal to comply with injunctions and other lawful court orders designed to protect abortion providers.[4] See Stipulated Facts at 8-12. Finally, defendants continue to assert that their conduct did not violate FACE and that they should not be subjected to any legal consequences as a result of their actions. See Opp. Br. at 14. These facts indicate that the wrongful behavior of defendants could be reasonably expected to recur, and that a permanent injunction is necessary.

Furthermore, "an enjoined party ought not to be rewarded merely for doing what the court has directed." 11A Wright & Miller, Federal Practice and Procedure, § 2961 at 405 (1995); see also Walling v. Harnischfeger Corp., 242 F.2d 712, 713 (7th Cir. 1957) (refusing to dissolve permanent

4. As pp. 8-12 of the Stipulated Facts indicate, defendants Blake, Boissonneault, Fitzpatrick, Gregg, Green, O'Hara, O'Keefe, Lynch, Matheson, McDaniel, Menchaca, Pagnanelli, Raiser, Roach, Soderna, Traphagen, and Wagi had each been involved in anti-abortion blockades prior to carrying out blockades at MMA.

injunction solely on the basis of defendants' compliance; finding that "[c]ompliance is just what the law expects"). "Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of the power to hear and determine the case, i.e., does not make the case moot." Phillips, 657 F.2d at 568-69. Thus, the fact that Defendants have not engaged in obstructive behavior at MMA since the preliminary injunction was granted is not enough to convince the Court that there is no longer a need for the injunction.

Defendants' refusal to acknowledge the illegality of their conduct also prevents this case from being moot. The Supreme Court held in Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43, 89 L. Ed. 29, 65 S. Ct. 11 (1944), that a case was not moot when, despite voluntary compliance, "a controversy over the legality of the [challenged conduct] still remains." See also Dow Chem. Co. v. EPA, 605 F.2d 673, 679 (3d Cir. 1979) (finding case not moot because defendant had not "altered its substantive stance" regarding the legality of the challenged conduct); Donovan v. Cunningham, 716 F.2d 1455, 1461 (5th Cir. 1983) (stating that argument that "voluntary cessation does not constitute mootness is particularly true in the face of [defendants'] continued insistence that their discontinued activities were legal . . ."), cert. denied, 467 U.S. 1251, 82 L. Ed. 2d 839, 104 S. Ct. 3533 (1984). Despite this Court's findings to the contrary, defendants continue to insist that FACE does not apply to them and that FACE is unconstitutional.

Defendants have not met their burden of proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney, 484

U.S. at 66. In fact, the record indicates quite the contrary — that at least some of the defendants are likely to engage in the wrongful behavior. This is apparent from the fact that defendants continue to insist that their discontinued activities are legal and that many defendants have a history of obstructive and threatening conduct at abortion clinics. Thus, the case is not moot and the Court will grant a permanent injunction to prevent defendants from violating FACE in the future.

Scope

This Court found in its Findings of Fact and Conclusions of Law at the Preliminary Injunction Hearing that the evidence submitted at the time of the hearing did not warrant a buffer zone. Findings of Fact and Conclusions of Law, at 31, § 40. The Court stated:

> The obstructive acts in evidence in this case took place inside of, or at the main entrance to, the MMA building. Accordingly, only the acts that are violative of the Access Act, and for which the evidence supports the imposition of a preliminary injunction, will be enjoined. The injunction will be limited to such obstructive acts.

Id.

The United States argues that a buffer zone is appropriate in light of many defendants' demonstrated intent to interfere repeatedly with the provision of abortions at MMA. The United States recounts facts where some defendants blockaded MMA despite having been enjoined or subjected

to criminal penalties in other cases. The Court was aware of such facts in refusing the buffer zone at the preliminary injunction hearing. The Court once again rejects this argument based on the reasoning quoted above.

The United States also argues that a buffer zone is necessary due to the physical layout of the area in which MMA is located. Once again, the Court was aware of the layout at the preliminary injunction hearing when it denied the request for a buffer zone. No new facts have been alleged concerning the physical layout, and the Court rejects this argument.

The United States also argues that a buffer zone that gives law enforcement officers a definite, objective "bright line" by which to measure compliance would aid enforcement of the injunction. The United States puts forth deposition testimony of Lt. William Ryan and Deputy U.S. Marshal Blair Deem to this effect. Although this is certainly true, the fact still remains that the obstructive acts took place inside of, or at the entrance to, the MMA building. There is no evidence to support an injunction for acts that might occur across the street. The Court will not broaden the injunction for the sole reason of creating a bright line to aid officers in enforcement, when the evidence does not support such a bright line.

Therefore, because the United States has produced no new evidence since the time of the preliminary injunction hearing that would serve as an adequate basis for a 60-foot buffer zone, the Court finds relief including such a buffer zone is not warranted in this case.

Appendix B

Statutory Damages

18 U.S.C. § 248(c)(1)(B) states, "With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation." The court may award statutory damages by summary judgment when no material facts are in dispute. Greenhut v. Hand, 996 F. Supp. 372 (D.N.J. 1998) (statutory damages awarded in Access Act lawsuit at summary judgment phase); Milwaukee Women's Medical Servs., 2 F. Supp. 2d 1172 (E.D. Wis. 1998) (court assessed statutory damages based on summary judgment motion). In filing this lawsuit, the United States requested that the Court impose a statutory damages award of $5,000 on each defendant for each time that defendant violated FACE. The parties disputed the proper interpretation of the civil remedies provisions of FACE, and the Court issued a Memorandum of June 18, 1998 resolving that dispute. The following analysis is based on the Memorandum of June 18, 1998.

The first dispute is whether the "$5,000 per violation" clause in 18 U.S.C. § 248(c)(1)(b) authorizes imposition of $5,000 in statutory damages per defendant participating in a given blockade-type violation of FACE, or whether that section authorizes only $5,000 per blockade, presumably to be shared by all defendants participating in such blockade. Two district court cases have addressed this precise question, and both of them resolved the issue in accordance with the contention of defendants here. See Greenhut, 996 F. Supp. at 379 (awarding $5,000 per violation); Milwaukee Women's

Medical Servs., 2 F. Supp. 2d at 1178 (stating that FACE authorizes statutory damages in the amount of $5,000 per violation, not per defendant).

This Court also resolves the issue in accordance with the contentions of the defendants here, for the following reasons. The Court's starting point on any question of statutory interpretation is the language of the statute. Built into that language is a dichotomy of expression that this Court finds meaningful as to the intent of Congress. In authorizing compensatory "statutory damages," Congress used the phrase "per violation." The intent of Congress was to eliminate the usual burden of an aggrieved person to prove actual damages, and to authorize compensation to such person, in an amount which it felt to be fair and just, for interference with that person's right to obtain or provide reproductive health services. Such fair and just compensation does not depend on, or relate to, the number of defendants interfering with such a right. One person can just as effectively injure, interfere with, or intimidate as can a group, depending on the circumstances. Moreover, conduct not involved here, but subject to the same civil remedies, such as interference with religious freedom rights and damage to religious worship facilities, can be perpetrated by a single individual or by a group. Given those variables, in this Court's view, Congress chose to authorize compensatory statutory damages in a fixed amount regardless of the number of individuals participating in the violation. Moreover, being compensatory, the $5,000 award logically and legally relates to the injury suffered rather than to the number of perpetrators, and, as indicated above, the injury suffered does not necessarily vary depending on the number of perpetrators.

Appendix B

In sharp contrast to the language it used in the compensatory statutory damages provision, Congress authorized the Court to assess substantial civil penalties "against each respondent" to vindicate the public interest, in an action brought by the Attorney General. See 18 U.S.C. § 248(c)(2)(B). Simply put, Congress knew how to make it clear that each defendant was to be individually and monetarily responsible, when that was its intention. Because it used different language in authorizing compensatory statutory damages, this Court concludes that it meant something different. The considerations referred to above suggest to this Court that Congress meant to authorize $5,000 in compensatory statutory damages against all responsible persons jointly, for each violation.

The fact that, under the circumstances of this case, individual defendants would not necessarily be subject to a meaningful financial deterrent does not change the Court's view. Actual damages are available if proven, and meaningful financial deterrents are provided for under the civil penalty provisions if they would vindicate the public interest.

Defendants also argue that in no event may the Attorney General recover the statutory damages referred to in § 248(c)(1)(B). The Court rejects this argument. In an action by the Attorney General under § 248(c)(2), the relief available is the same as that available to an "aggrieved person" plaintiff, except that the Attorney General may not be awarded costs and fees and may recover civil penalties instead of the punitive damages available to the "aggrieved person" plaintiff. The specific cross-reference in § 248(c)(2)(B) to "compensatory damages to persons

aggrieved as described in paragraph 1(B)" can only mean that the Attorney General is entitled to the same compensatory (including statutory) damages as an "aggrieved person" plaintiff could recover.

Defendants argue that they are entitled to mitigation of damages because their focus on the days in question was on partial birth abortions, which have been declared unlawful by the New Jersey Legislature. The Court rejects this position. Consistent with its prior rulings that partial birth abortions constitute "reproductive health services" within the meaning of FACE, the Court sees no reason to treat a focus on partial birth abortions as a mitigating factor in imposing the statutory damages sought.

Finally, defendants argue that the Attorney General is violating 18 U.S.C. § 248(d) and attempting to subvert New Jersey law by bringing this action. The Court disagrees. This action does not constitute interference with the enforcement of P.L. 1997, Chapter 262, whose enforcement mechanisms include license revocations and monetary penalties. See N.J.S.A. 2A:65A-5 et seq. This action seeks to enforce FACE against conduct which this Court has found to violate its terms.

Based on this interpretation of the statutory damages provision of FACE, the Court finds defendants jointly and severally liable (see, e.g., Milwaukee Women's Medical Servs., 2 F. Supp. 2d at 1179) for $5,000 in statutory damages for each violation in which they participated. It appears that only five of the named defendants were involved in the August 7, 1996 violation — Gregg, McDaniel, Menchaca,

Pagnanelli, and Raiser. Thus, these defendants will be jointly and severally liable for $5,000. It appears that twelve of the named defendants participated in the January 18, 1997 violation — Menchaca, Henry, Kidd, Matheson, O'Keefe, Alvarado, O'Hara, Roach, Rudnick, Soderna, Sweatt, and Wagi. Thus, these defendants will be jointly and severally liable for $5,000. It appears that nineteen of the named defendants participated in the March 15, 1997 violation — Menchaca, Henry, Kidd, Matheson, O'Keefe, Adams, Blake, Boissonneault, Dino, Elliot, Fitzpatrick, Foley, Green, Lynch, Micco, Mulrenan, Traphagen, James Trott, and Kimiko Trott. Thus, these defendants will be jointly and severally liable for $5,000.

Accordingly, IT IS on this 11th day of December 1998 ORDERED that the motion for summary judgment of the United States is granted. Final Judgment is entered as follows:

(1) Defendants and their agents, servants, employees, attorneys, and all individuals acting in concert with them who receive actual notice of this Order are prohibited from:

(a) In any physical way, blocking, impeding, inhibiting, interfering with, or obstructing access to the Metropolitan Medical Associates Building and facilities at 40 Engle Street in Englewood, New Jersey (or attempting to do so); and

(b) In any physical way, intimidating or attempting to intimidate anyone seeking access to the said Metropolitan Medical Associates building and facilities at 40 Engle Street in Englewood, New Jersey; and

(c) Entering on or being located on or within the premises of said Metropolitan Medical Associates at 40 Engle Street in Englewood, New Jersey (or attempting to do so), unless seeking reproductive health services available from Metropolitan Medical Associates.

(2) Defendants are jointly and severally liable for $5,000 for each violation in which they participated, with a maximum liability of all defendants of $15,000. More specifically, defendants Gregg, McDaniel, Menchaca, Pagnanelli, and Raiser are jointly and severally liable for $5,000 for their violations of FACE on August 7, 1996; defendants Menchaca, Henry, Kidd, Matheson, O'Keefe, Alvarado, O'Hara, Roach, Rudnick, Soderna, Sweatt, and Wagi are jointly and severally liable for $5,000 for their violations of FACE on January 18, 1997; and defendants Menchaca, Henry, Kidd, Matheson, O'Keefe, Adams, Blake, Boissonneault, Dino, Elliot, Fitzpatrick, Foley, Green, Lynch, Micco, Mulrenan, Traphagen, James Trott, and Kimiko Trott are jointly and severally liable for $5,000 for their violations of FACE on March 15, 1997.

John C. Lifland
United States District Judge

APPENDIX C — PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 22, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 97-2020 (JCL)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH R. GREGG, et al.,

Defendants.

PRELIMINARY INJUNCTION HEARING

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

FINDINGS OF FACT

1. Metropolitan Medical Associates, Inc. ("MMA") is a reproductive health care clinic that provides ambulatory care abortions and related services. Transcript of Preliminary Injunction Hearing ("Tr.") at 1.27.

2. MMA is located in a two-story building at 40 Engle Street, Englewood, New Jersey. MMA has a street-level front

entrance, directly adjacent to a public sidewalk. MMA patients and their visitors generally park on the street or in nearby parking lots, and walk down the Engle Street sidewalk to the clinic. MMA also has a small parking lot, which is used by staff only and is accessed by an alley to the side of the clinic building. Tr. at 1.27-1.28; Government Preliminary Injunction Hearing Exhibit ("Govt. Exh.") 1.

3. Persons entering MMA from the street must proceed past a first-floor security station and up a stairway to the second floor, through double glass doors, where the waiting room and reception area are located. Patients must register at the second floor reception desk and remain in the waiting room until called to the office area for an examination, laboratory tests and, in some cases, counseling. After counseling, patients who undergo medical procedures walk back down the stairway to the medical area on the first floor. Tr. at 1.29-1.32, 1.49-1.51; Govt. Exh. 2. The stairway between the first and second floors is the only one routinely used by patients or staff. Tr. at 1.32, 1.37-1.38.

4. The first floor street entrance is the only regularly used method for patients to enter and exit MMA. An emergency fire escape is located at the rear of the MMA building, near the staff parking lot. Tr. at 1.29, 1.51, 1.132; Govt. Exh. 2.

5. Anti-abortion protests and demonstrations at MMA are restricted pursuant to orders issued in 1974 by the Superior Court of New Jersey. These orders require, *inter alia*, that protestors remain on the eastern side of Engle Street, across the street from the clinic. Govt. Exh. 3.

Appendix C

6. The distance from the front door of MMA across Engle Street to the eastern side of the street is approximately 60 feet. Tr. at 1.19-1.20; Govt. Exh. 1.

7. Three blockades occurred at MMA between August 1996 and March 1997. A fourth blockade of MMA was attempted in April 1997.

August 7, 1996 Blockade of MMA

8. On August 7, 1996, five of the named defendants — Joseph Gregg, Ruby McDaniel, Luis Menchaca, Franco Pagnanelli and William Raiser — blocked access to MMA by placing themselves inside the clinic building on the second floor landing in front of the clinic's patient waiting room entrance and office area, completely blocking the staircase. *See* Tr. at 1.41-1.42, 1.94-1.95, 1.125-1.128, 1.111; Govt. Exhs. 2, 4A-B, 6l, 6n, 6p, 6u-v.

9. The five defendants were seated in two groups, one group of three and one group of two individuals. They had locked themselves together with u-shaped kryptonite bicycle locks. The bicycle locks were placed around each of their necks and then linked together. Defendants McDaniel and Pagnanelli were locked together in one group; the other three defendants were locked together in a second group. At the hearing, Englewood Police Officers George Wathney and Steven Sabo were able to identify defendants Pagnanelli and McDaniel as the individuals pictured in Government Exhibit 4B. Tr. at 1.95-1.98, 1.128, 1.110, 1.128, 1.42-1.43, 1.112, 1.117; Govt. Exhs. 4A, 4B.

10. Numerous police officers and fire department personnel were required to respond to the blockade of MMA. Tr. at 1.93-1.94, 1.129-1.130, 1.100.

11. The defendants refused to leave or unlock themselves in response to police requests to do so. Tr. at 1.100-1.104, 1-130-1.131.

12. It took fire department personnel considerable time to cut through one set of locks on the defendants. Ultimately, they were unable to remove all of the locks on site. Two of the defendants had to be carried by police officers, still locked together, out of the clinic and to police vehicles. Tr. at 1.105-1.106, 1.131.

13. During the blockade, access to MMA's second floor patient and office areas was completely blocked. Tr. at 1.131-1.132, 1.125, 1.27-1.28.

14. During the blockade, defendants McDaniel and Pagnanelli, who were locked together, were inside the clinic when the door against which they were leaning was opened from the inside. Pagnanelli and McDaniel moved into the open doorway. Police officers had to forcibly remove these two defendants from the doorway so that the door could be closed. Tr. at 1.104, 1.129.

15. During the blockade, the defendants were, at times, loud and belligerent, yelling statements that expressed their opposition to abortion. Tr. at 1.43, 1.131, 1.101, 1.113-1.114.

16. As a result of the blockade, some MMA staff members conducted themselves as if they were angry and

shaken. Some acted intimidated by defendants' actions, by expressing desires to quit working at MMA. Tr. at 1.44-1.48.

17. All five individuals were arrested and charged with trespass and other violations. Tr. at 1.132, 1.140; Govt. Exhs. 61, 6n, 6p, 6u-v.

January 18, 1997 Blockade of MMA

18. On January 18, 1997, 12 of the named defendants — Luis Menchaca, Michael Henry, Rose Kidd, Arnold Matheson, Katharine O'Keefe, Eva Alvarado, Joseph O'Hara, Joseph Roach, Robert Rudnick, James Soderna, James Sweatt and Elizabeth Wagi — blocked access to MMA by sitting or lying in front of the clinic building entrance on Engle Street. Tr. at 1.136, 1.214-1.215; Govt. Exhs. 6b, 6d, 6j, 6o, 6s-t, 6w-z, 6dd.

19. These defendants blockaded MMA despite the presence of police officers in their official vehicles directly in front of the clinic. Tr. at 1.134-1.136, 1.157.

20. Some defendants initially tried to enter the clinic and had to be forcibly kept out of the clinic by MMA staff and police. Tr. at 1.138.

21. The defendants refused to leave the clinic entranceway and had to be physically removed and carried away by police officers. Tr. at 1.138-1.139, 1.152.

22. At the hearing, defendants put into evidence a videotape showing the blockade. The videotape showed

individuals crossing Engle Street and sitting and/or lying in front of the clinic entrance. Defendants' Preliminary Injunction Hearing Exhibit ("Defs. Exh.") 1; Tr. at 2.155-2.156, 2.158-2.160, 2.162-2.164 (showings of Defs. Exh. 1).

23. The defendants were part of a crowd of demonstrators who were outside the clinic protesting against abortion, including yelling anti-abortion statements. Tr. at 1.134-1.135, 1.155; Defs. Exh. 1.

24. The twelve blockaders were arrested and charged with trespass and other violations. Tr. at 1.139-1.140; Govt. Exhs. 6b, 6d, 6j, 6o, 6s-t, 6w-z, 6dd.

March 15, 1997 Blockade of MMA

25. On March 15, 1997, 19 of the named defendants — Menchaca, Henry, Kidd, Matheson, O'Keefe, Byron Adams, Kevin Blake, Amy Boissonneault, Baldo Dino, Stephen Elliot, Sheryl Fitzpatrick, Mary Foley, Dennis Green, George Lynch, Raymond Micco, Alexis Mulrenan, Ralph Traphagen, James Trott and Kimiko Trott — blocked access to MMA by sitting or lying in front of the clinic building entrance on Engle Street. Tr. at 1.175, 1.216, 1.239-1.240; Govt. Exhs. 5, 6a, 6c-k, 6m, 6o, 6p-r, 6t, 6aa-cc.

26. This blockade was conducted in two separate waves. Tr. at 2.66.

27. The first group of blockaders ran across Engle Street, sat or lay in front of the entranceway, refused to leave when asked by police officers and had to be physically removed

by the officers. Tr. at 1.169, 1.171-1.173, 1.241, 1.244, 2.12, 2.64-2.65; Govt. Exh. 5.

28. The second wave of blockaders ran across the street just as the officers had cleared the clinic's entrance area of the first group. Like the first group, the second group sat and lay in front of the entranceway, refused to leave when asked by police and had to be physically removed. Tr. at 1.173-1.174, 1.241-1.242, 2.66-2.67; Govt. Exh. 5.

29. As the officers attempted to remove the blockaders on March 15, many of them physically resisted, locking arms and legs, holding onto each other and scrambling back toward the door each time the officers pulled them away. Tr. at 1.172-1.174, 1.241-1.243; Govt. Exh. 5.

30. At times, individuals seeking access to the clinic on March 15 were unable to enter MMA until the area around the clinic entrance was cleared by police. Tr. at 1.216, 2.71; Govt. Exh. 5. Officers escorted individuals, some of whom were angry, hysterical and crying, into the building.

31. The March 15 blockade caused one MMA patient concern over having to step over people to enter MMA. Tr. at 1.177, 2.70-2.74.

32. One defendant, Arnold Matheson, kicked a police officer twice in the groin and attempted to "head-butt" the officer during the arrests. Tr. at 2.13-2.17, 2.22, 2.24, 2.26-2.27.

33. The scene outside the clinic was chaotic and loud, with a crowd of anti-abortion demonstrators contributing to

the chaos by yelling and chanting, including one demonstrator who yelled through a megaphone at police officers. The demonstrators carried anti-abortion signs and chanted and yelled anti-abortion slogans. The crowd of demonstrators cheered for the two waves of blockaders as they crossed the street and blocked the clinic entrance. The demonstrators also yelled at and berated police officers as they removed the blockaders. Tr. at 1.163, 1.178-1.180, 1.215; Govt. Exh. 5.

34. Defendants carried out the March 15 blockade in spite of substantial law enforcement presence outside the clinic. In order to respond to defendants, Englewood police had to call for assistance from neighboring towns and municipalities. At some times during the March 15 blockade, police were forced to close Engle Street, a main thoroughfare, in order to better respond to the disturbance created by the defendants and demonstrators. Tr. at 1.164-1.166, 1.169, 1.179-1.180.

35. All 19 defendants were arrested and charged with trespass and other violations. Five of the 19 defendants had participated in either the August 1996 or January 1997 blockade. Govt. Exhs. 6a, 6c-k, 6m, 6o, 6p-r, 6t, 6aa-cc.

April 19, 1997 Attempted Blockade of MMA

36. On April 19, 1997, the day after this lawsuit was filed, numerous anti-abortion demonstrators attempted to blockade the clinic, including defendant Matheson. Tr. at 2.133-2.134 (Stipulation) and Government Exhibits 6a-dd.

37. Despite police erecting police barricades and lining the street with police vehicles, these individuals ran across

the street in more than one group, between and over police vehicles, in an effort to get to the entrance to MMA. Some demonstrators threw themselves under police vehicles, suffering cuts and scrapes. One demonstrator dove under a police van that was running and grabbed onto the underside, requiring officers to crawl under the vehicle to pull him out. Tr. at 2.17-2.21, 2.35, 2.53-2.54, 2.58.

38. Police apprehended and arrested the demonstrators before they could reach the clinic entrance. These individuals were charged with trespass and other violations. Tr. at 2.19, Govt., Exhs. 6o-r, 6u, 6x, 6bb.

CONCLUSIONS OF LAW

Statutory Authority

1. The Court has jurisdiction over this action under the Freedom of Access to Clinic Entrances Act of 1994 ("Access Act"), 18 U.S.C. § 248, and 28 U.S.C. § 1345.

2. The United States has standing to initiate this action under the Access Act, 18 U.S.C. § 248(c)(2).

3. The Access Act, 18 U.S.C. § 248, provides, in pertinent part:

> (a) Prohibited Activities. — Whoever —
>
> > (1) by . . . physical obstruction . . . intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person

> because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . . shall be subject to the . . . civil remedies provided in subsection (c).

4. The Access Act expressly authorizes the issuance of "temporary, preliminary or permanent injunctive relief." 18 U.S.C. § 248(c)(2)(B).

Definitions: Obstruction, Intent, and Interference

5. The Access Act defines a physical obstruction as:

> [R]endering impassable ingress to or egress from a facility that provides reproductive health services or rendering passage to or from such a facility unreasonably difficult or hazardous.

18 U.S.C. § 248(e)(4). Entry into or invasion of the clinic, physical injury to clinic clients or staff, or the non-occurrence of scheduled procedures or abortions are *not* elements of an obstruction under the Act, and therefore, need not be demonstrated to establish a violation of the Act. *Id. See also United States* v. *Roach*, 947 F. Supp. 872, 876 (E.D. Pa. 1996). Similarly, as long as access is made "unreasonably difficult or hazardous," it is not necessary to establish that there was absolutely no way to enter an abortion facility in order to prove a violation of the Act. *United States* v. *Soderna*, 82 F.3d 1370, 1377 (7th Cir.), *cert. denied sub nom Hatch* v. *United States*, __ U.S. __, 117 S. Ct. 508 (1996)

(finding that "unreasonably difficult" access in the context of the Access Act includes having to surpass such obstacles as individuals "lying down across the entrance so that the entrant has to step — or jump? — over the blockader" and instances in which "only one entrance of several (but that the main one) is blocked"); *United States* v. *Lindgren*, 883 F. Supp. 1321, 1328 (D.N.D. 1995).

6. For purposes of the Access Act, "intent" means "intending to perform the act and aware of the natural and probable consequences of it." Legislative history of Access Act, S. Rep. 103-117, 103rd Cong., 1st Sess. 24 n. 39 (1993) ("S. Rep. 103-117").

7. Under the Access Act, to "interfere with" means "to restrict a person's freedom of movement." 18 U.S.C. § 248(e)(4).

Constitutionality of the Access Act

8. As held by every circuit court to consider the issue, Congress possessed authority under the Commerce Clause, U.S. Const. art. 1, §8, cl.3, to enact the Access Act. *See Hoffman* v. *Hunt*, 126 F.3d 575, 587-88 (4th Cir. 1997) *Terry* v. *Reno*, 101 F.3d 1412, 1415-18 (D.C. Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2431 (1997); *Soderna*, 82 F.3d at 1373; *United States* v. *Dinwiddie*, 76 F.3d 913, 919-20 (8th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 613 (1996); *United States* v. *Wilson*, 73 F.3d 675, 678-88 (7th Cir. 1995), *cert. denied*, __ U.S. __, 117 S. Ct. 47 (1996); *Cheffer* v. *Reno*, 55 F.3d 1517, 1519-21 (11th Cir. 1995); *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 647

(4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); *United States* v. *Smith*, No. 4:95-CV-0025 (N.D. Ohio January 14, 1997) at *3-7; *Planned Parenthood of Southeastern Pennsylvania, Inc.* v. *Walton*, 949 F. Supp. 290, 295-96 (E.D. Pa. 1996); *Roach*, 947 F. Supp. at 876; *United States* v. *Weslin*, 964 F. Supp. at 83, 88-90 (W.D.N.Y. 1997); *United States* v. *Scott*, 958 F. Supp. 761, 778 (D. Conn. 1997); *Planned Parenthood of the Columbia/Willamette, Inc.* v. *American Coalition of Life Activists*, 945 F. Supp. 1355, 1374-75 (D. Ore. 1996); *United States* v. *White*, 893 F. Supp. 1423, 1432-34 (C.D. Cal. 1995); *United States* v. *Lucero*, 895 F. Supp. 1419, 1423-25 (D. Kan. 1995); *United States* v. *McMillan*, 946 F. Supp. 1254, 1261-62 (S.D. Miss. 1995); *United States* v. *Hill*, 893 F. Supp. 1034, 1036-38 (N.D. Fla. 1994); *Reily* v. *Reno*, 860 F. Supp. 693, 707-708 (D. Ariz. 1994); *Cook* v. *Reno*, 859 F. Supp. 1008, 1011 (W.D. La. 1994); *Council for Life Coalition* v. *Reno*, 856 F. Supp. 1422, 1431 (S.D. Cal. 1994).

9. In enacting the Access Act, Congress rationally concluded that the Act protects persons and things in interstate commerce. S. Rep. No. 103-117 ("[M]any of the patients who seek services from [abortion providers] engage in interstate commerce by traveling from one state to obtain [the abortion services] in another"); *accord* H. Conf. Rep. No. 103-448 at 7 (1994), *reprinted in* 1994 U.S.C.A.A.N. at 724; H.R. Rep. No. 103-306 at 10 (1993) *reprinted in* 1994 U.S.C.A.A.N. at 707. *See also Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 758, 782, 792 (Stevens, Blackmun, JJ., dissenting); *Hoffman*, 126 F.3d at 587-88; *Soderna*, 82 F.3d at 1373.

Appendix C

10. In enacting the Access Act, Congress rationally concluded that the Act proscribes conduct that substantially affects interstate commerce. *Terry*, 101 F.3d at 1416-17 ("In light of the Senate Report's detailed review of the effect violent and obstructive anti-abortion protest has had upon the availability of abortions nationwide, we have no doubt that Congress found the impact of such activities on interstate commerce to be substantial."); *Hoffman*, 126 F.3d at 587-88; *Wilson*, 73 F.3d at 679; *Cheffer*, 55 F.3d at 1519-20. S. Rep. 103-117 at 5, 14, 17, 31, H.R. Rep. at 8-9, *reprinted in* 1994 U.S.C.A.A.N. at 705-06.[1]

11. The Supreme Court's decision in *United States* v. *Lopez*, __ U.S. __, 115 S. Ct. 1624 (1995), striking down the Gun-Free School Zones Act, does not alter the conclusion that Congress had authority under the Commerce Clause to enact the Access Act. The Gun-Free School Zones Act and the Access Act are "fundamentally different" statutes. *See Terry*, 101 F.3d at 1417; *Soderna*, 82 F.3d at 1374; *Cheffer*, 55 F.3d at 1520 ("[u]nlike the Gun-Free School Zones Act, the Access Act * * * regulate[s] commercial activity, the provision of reproductive health services"); *Dinwiddie*, 76 F.3d at 920-921 ("unlike the Gun-Free School Zones Act, [Access Act] prohibits interference with a

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1. Two recent Third Circuit decisions reaffirm that courts should defer to Congress when it finds that certain conduct impacts interstate commerce. *See United States* v. *Parker*, 108 F.3d 28, 30 (3d Cir.), *cert. denied*, No. 96-9253, __ S. Ct. __ (U.S. Oct. 6, 1997); *United States* v. *Bishop*, 66 F.3d 569, 577 (3d Cir.), *cert. denied*, __ U.S.__, 116 S. Ct. 681 (1995). The Third Circuit made these rulings even after the Supreme Court's decision in *United States* v. *Lopez*, __ U.S. __, 115 S. Ct. 1624 (1995), discussed *infra*.

commercial activity — the provision and receipt of reproductive health services" and "does not require us to 'pile inference upon inference' " (quoting *Lopez*)); *Wilson*, 73 F.3d at 682-84 (same as *Cheffer*); *Hoffman*, 126 F.3d at 587-88 (finding that acceptance of Congress' Commerce Clause authority to enact the Access Act will not, as was the case in *Lopez*, effectively remove all limitations on Congress' commerce power and rejecting the plaintiffs' *Lopez* argument); *McMillan*, 946 F. Supp. at 1261-62 (rejecting defendants' *Lopez* argument); *Smith*, No. 4:95-CV-0025 at *6-7 (relying on *Dinwiddie*, court rejects *Lopez* argument).

12. The Access Act does not violate the First Amendment of the Constitution. *Hoffman*, 126 F.3d at 588; *Dinwiddie*, 76 F.3d at 921, *Cheffer*, 55 F.3d at 1521-22; *American Life League*, 47 F.3d at 648-649, 652; *Woodall* v. *Reno*, 47 F.3d 656, 657 (4th Cir.), *cert. denied*, 515 U.S. 1141 (1995); *Smith*, No. 4:95-CV-0025 at *7-10; *Lucero*, 895 F. Supp. at 1424-25; *United States* v. *Brock*, 863 F. Supp. 851, 857-67 (E.D. Wis. 1994), *aff'd sub. nom*, *United States* v. *Soderna*, 82 F.3d 1370 (7th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 507 (1996); *Reily*, 860 F. Supp. at 700-05; *Cook*, 859 F. Supp. at 1010-11; *Council for Life Coalition*, 856 F. Supp. at 1426-28. The Access Act does not violate the First Amendment rights of individuals who blockade and physically obstruct abortion clinics. *Soderna*, 82 F.3d at 1374-76 (rejecting defendants' First Amendment challenge to the application of the Access Act to their non-violent blockade of an abortion clinic); *Roach*, 947 F. Supp. at 876 (holding specifically that the Access Act did not violate the First Amendment as applied to a clinic blockade identical in nature to the blockades conducted by defendants here);

see also White, 896 F. Supp. at 1435 (court rejected defendants' as-applied First Amendment challenge in case involving obstruction and threats).

13. The Access Act is not overly broad and does not chill expression protected by the First Amendment. *Hoffman*, 126 F.3d at 588-89; *Dinwiddie*, 76 F. 3d at 921; *Cheffer*, 55 F.3d at 1521; *American Life League*, 47 F.3d at 652-653; *Woodall*, 47 F.3d at 657; *Smith*, No. 4:95-CV-0025, at *10; *Brock*, 863 F. Supp. at 866; *Reily*, 860 F. Supp. at 704-05; *Cook*, 859 F. Supp. at 1010-11; *Council for Life Coalition*, 856 F. Supp. at 1428-29; *White*, 896 F. Supp. at 1437; *Lucero*, 895 F. Supp. at 1424-25. The Access Act prohibits conduct, not speech; it proscribes solely the use of "*force*," "*threat[s] of force*," or "*physical obstruction*" that "intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person" engaged in certain activities. 18 U.S.C. § 248(a)(1) (emphasis added); *see Cheffer*, 55 F.3d at 1521; *American Life League*, 47 F.3d at 648. *See also* 18 U.S.C. § 248(d)(1) ("Nothing in this section shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution"). The Access Act "prohibits only a narrow range of conduct." *Terry*, 101 F.3d at 1421; *Dinwiddie*, 76 F.3d at 924 ("FACE prohibits only a limited range of activity. It is not even close to being overbroad"); *Scott*, 958 F. Supp. at 778 (same as *Dinwiddie*). "[I]t is difficult to see how the Act is substantially overbroad in relation to its legitimate scope of outlawing violence and barriers to access." *American Life League*, 47 F.3d at 653.

14. The Access Act is not unconstitutionally vague. *See Terry*, 101 F.3d at 1421 ("[T]he Access Act defines its terms narrowly and in clearly understandable language"); *Soderna*, 82 F.3d at 1376 (rejecting the argument that the Act's definition of "physical obstruction" is impermissibly vague); *American Life League*, 47 F.3d at 653 ("the Act . . . speaks in clear, common words," including specific definitions prescribing what conduct is prohibited); *Dinwiddie*, 76 F.3d at 924, citing *Cameron* v. *Johnson*, 390 U.S. 611 (1968), (meaning of terms " 'interfere with, physical obstruction, intimidate, force or threat of force, and injures' " is "quite clear"); *Roach*, 947 F. Supp. at 876 (Access Act terms are specifically defined and not vague); *Walton*, 949 F. Supp. at 292 (same as *Roach*); *Scott*, 958 F. Supp. at 779 (same); *White*, 893 F. Supp. at 1437 (same as *Roach*); *Planned Parenthood of the Columbia/Willamette, Inc.*, 945 F. Supp. at 1378 (Access Act's definitions of prohibited conduct, including obstruction, are "specific and clear" and "by themselves, are sufficient to defeat [a] vagueness challenge"). Thus, the Act survives the test established in *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972), because it provides a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

15. The Access Act is viewpoint neutral. The Act proscribes conduct without regard to the message conveyed by, or the viewpoint of, the person engaging in the conduct. *American Life League*, 47 F.3d at 649, 652; *Weslin*, 964 F. Supp. at 84-87; *White*, 893 F. Supp. at 1435-38; *Brock*, 863 F. Supp. at 863-66. As the District of Columbia Circuit found:

Appendix C

The Access Act does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion. Because the Act criminalizes only violent or obstructive conduct against reproductive health facilities or those seeking to obtain or provide reproductive health services, the views of those arrested for committing violence against or obstructing people obtaining or providing reproductive health services are irrelevant.

Terry, 101 F.3d at 1419; *see Soderna*, 82 F.3d at 1375-76 (Congress insulated Access Act from allegations of viewpoint bias by defining "reproductive health services" so broadly as to include even pro-life counseling centers). *See also Walton*, 949 F. Supp. at 293 ("Congress' purpose was not to discriminate against a particular idea, but to prohibit particular conduct"); *Planned Parenthood of the Columbia/Willamette, Inc.*, 945 F. Supp. at 1376, citing *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487-88 (1993) (Congress permitted to "single out" certain conduct relating to receipt or provision of reproductive health services if it concludes that such conduct "is thought to inflict greater individual or societal harm"). Similarly, the Access Act "is not content-based simply because it focuses on reproductive health services facilities and activity outside those facilities. Congress is free to legislate one problem at a time" as long as that legislation,is not content-based. *Brock*, 863 F. Supp. at 861 n. 18. "[C]ontent-neutral regulations that target particular locations do not violate the First Amendment."

Id. Moreover, even if the majority of individuals who have been charged with violating the Access Act oppose abortion, "[t]he fact that a statute . . . disproportionately punishes those who hold a certain viewpoint does not 'itself render the [statute] content or viewpoint based'." *Dinwiddie*, 76 F.3d at 923 (citing *Madsen* v. *Women's Health Care Center, Inc.*, 114 S. Ct. at 2524).[2] *See also Terry*, 101 F.3d at 1419-20; *Scott*, 958 F. Supp. at 774-75.

Showing for a Preliminary Injunction

16. In this Circuit, a party seeking a preliminary injunction must show that the following factors favor such relief: a) likelihood of success on the merits; b) extent to which the plaintiff is being irreparably harmed by the conduct complained of; c) extent to which the defendant(s) will suffer irreparable harm if the preliminary injunction is issued; and d) the public interest. *See A.T. & T. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1838 (1995) (citing *Opticians Ass'n* v. *Independent Opticians*, 920 F.2d 187, 191-92 (3d Cir. 1990) and *Merchant & Evans, Inc.* v. *Roosevelt Bldg. Prods.*, 963 F.2d 628, 632-33 (3d Cir. 1992)). *See also New Jersey Hosp. Ass'n* v. *Waldman*, 73 F.3d 509, 512 (3d Cir. 1995); *Duraco Prods., Inc.* v. *Joy Plastic Enter., Ltd.*, 40 F.3d 1431, 1438 (3d Cir. 1994).

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2. The Access Act's application to pro-life counseling centers is more than hypothetical. In *United States* v. *Mathison*, No. CR-95-085-FS (E.D. Wash.), the United States successfully prosecuted an individual under the Access Act for threatening a pro-life counseling center.

Appendix C

17. In order to obtain injunctive relief, a plaintiff need not show that it is certain to win. *SK&F, Co.* v. *Premo Pharmaceutical Laboratories, Inc.*, 625 F.2d 1055, 1066 (3d Cir. 1980) ("Our cases require that [plaintiff] make a showing of reasonable probability, not the certainty, of success on the merits") (citing *Oburn* v. *Shapp*, 521 F.2d 142, 148 (3d Cir. 1975); *see also* 11 C. Wright & K. Miller, *Federal Practice & Procedure* § 2948.3 (1973). Rather, a party seeking a preliminary injunction need only prove that it has a substantial likelihood of succeeding on the merits. *SF&K, Co.*, 625 F.2d at 1066. *See also University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981) ("A party . . . is not required to prove his case in full at a preliminary-injunction hearing").

18. Courts have issued preliminary injunctions pursuant, the Access Act in response to obstructive conduct directed at reproductive health care providers. *See, e.g., Roach*, 947 F. Supp. 872 (preliminary injunction issued to prevent future clinic blockades); *White*, 893 F. Supp. 1423 (preliminary injunction issued to prevent reoccurrence of obstruction and threats); *Lindgren*, 883 F. Supp. at 1325 (D.N.D. 1995) (same as *White*).

19. There is precedent even prior to the enactment of the Act for the issuance of preliminary injunctions in response to blockades and other obstructive conduct at reproductive health care clinics. *See e.g., Roe* v. *Operation Rescue*, 1988 WL 131407 (E.D. Pa. Dec. 6, 1988), *order aff'd*, 919 F.2d 857 (3d Cir. 1990) (finding civil contempt of Temporary Restraining Order enjoining blockades of certain clinics); *People of Abrams* v. *Terry*, 45 F.3d 17

(2d Cir. 1995) (upholding preliminary injunction against threatened blockades); *Pro-Choice Network* v. *Project Rescue*, 799 F. Supp. 1417 (W.D.N.Y. 1992), *aff'd sub nom.*, *Pro-Choice Network* v. *Schenck*, 67 F.3d 377 (2d Cir. 1995), *aff'd in part, rev'd in part*, __ U.S. __, 117 S. Ct. 855 (1997) (issuing preliminary injunction against threatened blockades); *NOW* v. *Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989) (issuing preliminary injunction against threatened blockades).

Likelihood of Success

20. The United States has demonstrated that it is likely to succeed on the merits at trial in this case. At the preliminary injunction hearing, the United States established that defendants blockaded MMA on three separate occasions — August 7, 1996, January 18, 1997 and March 15, 1997. The United States' evidence included nine witnesses, including five law enforcement officers, a Deputy United States Marshal, MMA's administrator, an independent videographer and a volunteer escort for clinic patients. The United States also introduced into evidence six exhibits, including a videotape of the March 15, 1997 blockade that showed defendants in front of MMA's entrance. Defendants' introduction at the hearing of a videotape of the January 18, 1997 incident provided additional evidence that the defendants blockaded MMA on that day. The evidence presented at the hearing demonstrated that during each of the three blockades defendants made ingress into MMA unreasonably difficult, in that persons seeking to enter MMA had to step or climb over the bodies of defendants as they blocked the entrances. These blockades, therefore, constituted

physical obstructions, as defined by the Access Act. 18 U.S.C. § 248(e)(4). Thus, the first element of an Access Act violation has been established.

21. The United States also established at the hearing that defendants conducted the blockades with the intent to interfere with individuals attempting to enter the clinic because these individuals were seeking to obtain or provide reproductive health services. The videotapes introduced at the hearing, as well as eyewitness testimony, demonstrated that the defendants, as well as numerous other individuals outside MMA on January 18 and March 15, 1997, yelled or uttered anti-abortion statements, including imploring women not to go into the clinic or not to kill their babies and carried anti-abortion signs. Furthermore, the evidence indicates that defendants refused to leave or move away from the clinic's entrance areas when repeatedly asked to do so by police officers during each of the three blockades; such openly defiant conduct demonstrates defendants' intent to interfere with clinic access. All of the evidence presented at the hearing indicates that defendants' actions on August 7, 1996 and January 18 and March 15, 1997 were motivated by their desire to stop abortions from occurring. Thus, the second and third elements of an Access Act violation have been established.

22. The Bergen County Sheriff's Office records identifying individuals arrested at MMA on the dates of the three blockades for trespass and other local violations constitute business records under Fed. R. Evid. 803(6), and qualify as exceptions to the rule against hearsay. *See* Govt. Exhs. 6a-dd; Tr. 2.142 (Govt. Exhs. 6a-dd admitted into

evidence). These records establish that the defendants were arrested at MMA on one or more of the dates of the three blockades. *See* Govt. Exhs. 6a-dd.

23. Defendants presented virtually no contrary evidence at the hearing. The only witness offered by the defendants was Dr. William Calvin, who testified about the January 18 and March 15 blockades. Tr. at 2.147-2.179. However, Dr. Calvin's testimony that the defendants never reached or blocked the door of the clinic on either January 18 or March 15 was directly contradicted by the testimony of the police officers, clinic escort and videographer who testified for the United States. Dr. Calvin was also contradicted by the March 15th videotape introduced by the United States and defendants' own January 18th videotape. Tr. at 2.165-2.168; *see also* Govt. Exh. 5; Defs. Exh. 1. In fact, at times during his testimony, Dr. Calvin admitted that the videotape showed blockaders in front of MMA's door or on the sidewalk directly in front of the door. Tr. at 2.158-2.160. On the witness stand, Dr. Calvin admitted that some of his prior statements regarding the January and March blockades, which he made in a sworn declaration and in deposition testimony, were incorrect and/or were contradicted by the videotape evidence. Tr. at 2.159; 2,174-2.177; 2.179. Moreover, Dr. Calvin's bias in favor of the defendants was evidenced by the fact that he has participated in and has been arrested at blockades and other anti-abortion activities with many of the defendants, that he himself had been arrested more than 20 times in connection with blockades and other anti-abortion activities, and that he believes it is acceptable to block access to an abortion clinic if in so doing the life of an unborn baby is saved. Tr. at 2.168-2.172. In light of the

discrepancies within his testimony and with evidence introduced by both parties at the hearing and his clear bias, Dr. Calvin's testimony is rejected.

24. The United States has demonstrated that it will likely succeed in proving at trial that the defendants violated the Access Act, 18 U.S.C. § 248, by physically obstructing access to MMA with the intent of interfering with individuals because those individuals were seeking or providing reproductive health services.

Irreparable Harm to Plaintiff

25. The Third Circuit has held that there is a presumption of irreparable harm to the plaintiff where, as here, the statute expressly provides for injunctive relief. *Government of Virgin Islands* v. *Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir. 1983). Applying this presumption, a court may award injunctive relief — based on a showing of probable cause that the statute is being violated. *Government of Virgin Islands*, 714 F.2d at 286 (citing *United States Postal Service* v. *Beamish*, 466 F.2d 804 (3d Cir. 1972)). Thus, the usual standard for obtaining injunctive relief — demonstration of "potential harm which cannot be redressed by a legal or an equitable remedy following a trial," *see Acierno* v. *New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (quoting *Instant Air Freight Co.* v. *C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989)) — is inapposite "where the public interest in question has been formalized in a statute." *Instant Air Freight Co.* v. *C.F. Air Freight, Inc.*, 882 F.2d 797, 803

(3d Cir. 1989); *United States* v. *Richlyn Labs., Inc.*, 827 F. Supp. 1145, 1150 (E.D. Pa. 1992).[3]

26. Moreover, where public safety is threatened, a presumption of irreparable harm attaches to any request for a statutorily authorized injunction. *See United States* v. *Barr Labs., Inc.*, 812 F. Supp. 458, 485 & n.29 (D.N.J. 1993) (citing *United States* v. *Toys "R" Us, Inc.*, 754 F. Supp. 1050, 1053 (D.N.J. 1991))[4]; *Richlyn Labs., Inc.*, 827 F. Supp. at

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3. Other circuits have likewise held that the presumption of irreparable harm applies in a statutory enforcement action. *See, e.g. E.E.O.C.* v. *Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1090 (5th Cir. 1987) ("[w]hen an injunction is expressly authorized by statute, and the statutory conditions are satisfied, the movant need not establish specific irreparable injury to obtain a preliminary injunction;" it is presumed); *United States* v. *Odessa Union Warehouse Co-Op*, 833 F.2d 172, 175-76 (9th Cir. 1987) (where United States seeks an "injunction [that] is authorized by statute, and the statutory conditions are satisfied . . . the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury"); *Mical Comm. Inc.* v. *Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035 (10th Cir. 1993) (no showing of irreparable injury required where violation of federal statute shown); *Illinois Bell Tel.* v. *Illinois Commerce Comm.*, 740 F.2d 566, 571 (7th Cir. 1984) (no showing of irreparable injury required where injunction is expressly authorized by statute); *United States* v. *Diapulse Corp.*, 457 F.2d 25, 28 (2d Cir. 1972) (no showing of irreparable injury or public interest required where statute violated).

4. In *Barr Labs.*, 812 F. Supp. at 485, n.29, this Court found that courts in the Third Circuit continue to presume irreparable harm regarding requests for statutory injunctions in public safety matters, despite Third Circuit cases suggesting that the necessity of showing (Cont'd)

1150 ("[f]aced with direct threats to public safety, district courts have continued to make a distinction between statutory and general equity injunctions").

27. Courts have applied a presumption of irreparable harm in Access Act cases brought by the United States. *See Roach*, 947 F. Supp. at 877, *citing Government of the Virgin Islands*, 714 F.2d at 286, (court applied presumption of irreparable harm based on finding of reasonable probability that United States would prove at trial that defendants had blockaded an abortion clinic in violation of the Access Act); *White*, 893 F. Supp. at 1430 (presumption applied in Access Act case involving obstruction and threats); *McMillan*, 946 F. Supp. at 1268 (same as *White*).

28. Because the Access Act explicitly authorizes the Court to issue a preliminary injunction and because the United States has shown that it is likely to succeed at a trial on the merits, it should be presumed that plaintiff United States has and will continue to suffer irreparable harm if the requested preliminary injunction is not issued. *See Government*

(Cont'd)
irreparable harm may vary with the particular statute involved and the relief requested. *See, e.g. Rosa* v. *Resolution Trust Corp.*, 938 F.2d 383, 400 (3d Cir.), *cert. denied*, 502 U.S. 981 (1991), and *Natural Resources Defense Council, Inc.* v. *Texaco Refining & Mktg., Inc.*, 906 F.2d 934, 937-40 (3d Cir. 1990); *see also Waterfront Comm'n of New York Harbor* v. *Construction & Marine Equipment Co.*, 928 F. Supp. 1388, 1395-98 (D.N.J. 1996). *Waterfront Commission* also held, however, that unlike private plaintiffs, a public entity charged with the responsibility to enforce a statute need not make a separate showing of irreparable harm or inadequacy of other remedies. *Id.* at 1398-99.

of Virgin Islands, 714 F.2d at 286; *Barr Labs., Inc.*, 812 F. Supp. at 485 & n.29; *Richlyn Labs.*, 827 F. Supp. at 1149; *Roach*, 947 F. Supp. at 877; *White*, 893 F. Supp. at 1430; *McMillan*, 946 F. Supp. at 1268.

29. Even without a presumption, the United States has demonstrated irreparable harm. By blockading the clinic, defendants interfered with MMA clients' exercise of their constitutional right to seek and obtain reproductive health care services. *See Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 845-846 (1992); *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986); *Roe* v. *Wade*, 410 U.S. 113 (1973), *reh. denied*, 410 U.S. 959 (1973). This harm cannot be compensated by any legal means and is thus irreparable. *Acierno*, 40 F.3d at 653 (3d Cir. 1994); *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 308-312 (1986) (damages "based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages").

30. Similarly, the harm to the public's interest in protecting the exercise of women's constitutional rights likewise cannot be cured by legal remedies. *See Memphis Community School District*, 477 U.S. at 308-312. Blockades such as the one of MMA make it difficult and costly for providers to operate their clinics, and thus, have the more long-term effect of causing needed clinics to close. The increasing number of clinic closings over the past two decades has made make it more difficult for citizens to exercise their fundamental legal right to obtain an abortion. *See* S. Rep. 103-117 at 16-17.

Appendix C

31. In enacting the Access Act, Congress explicitly recognized the harm to public safety caused by clinic blockades:

> Clinic blockades disrupt a wide range of health services [and] terrorize patients and staff.
>
> * * *
>
> [B]lockades that make access to a health care facility difficult or hazardous can have traumatic effects on patients by delaying their access to urgent medical care and by exacerbating their medical conditions . . . . For patients seeking abortion services, the adverse effects of a clinic blockade can be particularly serious . . . . [T]he risks associated with an abortion increase if the patients suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

S. Rep. 103-117 at 7, 15.

32. In drafting the Access Act, Congress specifically considered the need for Courts to use injunctions to prevent the harm caused by clinic blockades:

Appendix C

> The civil remedies of injunctions and damages are appropriate as a means of addressing massive blockades. Courts can fashion injunctive relief that will keep clinics operating.

S. Rep. 103-117 at 26-27 (quoting Testimony of Attorney General Janet Reno)

33. That the defendants have not blockaded MMA since March 15, 1997 is not dispositive. *See United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953). In *W.T. Grant*, the Supreme Court stated that "the court's power to grant injunctive relief survives discontinuance of the illegal conduct . . . . The purpose of an injunction is to prevent *future* violations." *Id.* at 633 (citations omitted) (emphasis added). In assessing the need for an injunction to prevent future violations, the court should consider any "expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of past violations." *Id.* at 633.

34. Defendants who have carried out blockades may be preliminarily enjoined under the Access Act even if time has passed since the date of the blockade, particularly if the defendants have a history of violating the Act and the rights of reproductive health consumers and providers. *See Roach*, 947 F. Supp. at 877 (issuing a preliminary injunction even though defendants had not returned to the clinic after a blockade; finding that "based on the history of these Defendants, there is no assurance that it will not happen again"); *United States* v. *Lindgren*, 883 F. Supp. at 1329 (defendants' conduct evidenced a "cognizable danger" that they would engage in physical obstruction in the future);

McMillan, 947 F. Supp. at 1268 (S.D. Miss. 1995) (even without a presumption of irreparable harm, the potential for future violations of the Access Act can establish irreparable harm under the more "traditional" formulation.) Given that defendants blockaded the clinic on three separate dates between August 7, 1996 and March 15, 1997, that some of the defendants attempted a fourth blockade on April 19, 1997, and that defendants knowingly violated state court orders through their conduct, it is reasonable to conclude that future blockades of MMA by some or all of these defendants are likely to occur, and that irreparable harm will result from not granting the requested preliminary injunction.

Harm to the Defendants

35. The issuance of an injunction will not cause the defendants irreparable harm. The requested injunction seeks only to restrain conduct not protected by the Constitution. *See, e.g. Mitchell*, __ U.S. __, 113 S. Ct. at 2199 (unlawful activity not protected by Constitution); *Cox* v. *Louisiana*, 379 U.S. 536 (1965) (peaceful protesting protected by Constitution). Defendants may not invoke the First Amendment to immunize conduct which is "interfering," "intimidating," or "injurious." *Hoffman*, 126 F.3d at 588; *Cheffer*, 55 F.3d at 1521-22; *American Life League, Inc.*, 47 F.3d at 650; *Council for Life Coalition*, 856 F. Supp. at 1426, *citing Mitchell*, __ U.S. __, 113 S. Ct. at 2199 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968)).

Public Interest

36. The Third Circuit has noted that while district courts should issue a preliminary injunction only after weighing

all factors, "as a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *A.T. & T. Co.*, 42 F.3d at 1427 n.8.

37. In addition to this presumed benefit to the public, the entry of the preliminary injunction requested in this case will tangibly further the public interest. In enacting the Access Act, Congress made a determination that the public interest is served when individuals who seek to provide or obtain reproductive health services can do so free from unlawful interference. Through the Access Act, Congress specifically sought to promote public health and safety by prohibiting obstructive conduct that historically has injured, intimidated, and interfered with persons seeking to provide or obtain reproductive health services. *See* S. Rep. 103-117 at 2. To this end, Congress authorized the Attorney General of the United States to initiate civil actions to enforce the Access Act and to seek necessary injunctive relief. 18 U.S.C. § 248(c)(2) and (c)(2)(B). Under the Access Act, the Attorney General plays an important role in "vindicating the enormous interest that our society has in protecting individual rights." S. Rep. 103-117 at 27.

38. Issuance of a preliminary injunction will promote public health and safety. It will allow MMA to provide reproductive services in a safe and orderly manner and will preclude additional blockades and obstructions of the clinic. It will thus help keep health care workers safe from harm and ensure that women maintain access to reproductive health care. In addition, an injunction will help ensure that any

protests conducted by Defendants remain within lawful bounds. Therefore, the requested injunction will promote and serve the public interest by ensuring effective law enforcement and safeguarding the interests that the Access Act was designed to protect.

Conclusion

39. The United States has met its burden of persuasion on each of the four prongs of the preliminary injunction standard, and therefore a preliminary injunction should issue.

40. The United States' proposed preliminary injunction includes a 60-foot fixed buffer zone. The evidence in this action does not warrant such a buffer zone. The obstructive acts in evidence in this case took place inside of, or at the main entrance to, the MMA building. Accordingly, only acts that are violative of the Access Act, and for which the evidence supports the imposition of a preliminary injunction, will be enjoined. The injunction will be limited to such obstructive acts.

Dated: Dec. 22, 1997

s/ John C. Lifland
John C. Lifland
United States District Judge